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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA AT JUNEAU**

MYRNA I. JOHNSON,)	
)	
Plaintiff,)	
)	
vs.)	
)	
FRED MEYER STORES, INC., and)	
JAIME SAN MIGUEL,)	
)	
Defendants)	Case No. J-04-008 CV (RRB)

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

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**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF
OPPOSITION TO MOTION FOR SUMMARY JUDGMENT**

I.

Introduction

The defendants' request for summary judgment in this matter must be denied because genuine issues of fact exist as to whether the end of Myrna Johnson's ten year career with Fred Meyer on March 18, 2002 was the result of her voluntarily quitting her job as opposed to a wrongful termination.

This brief will establish that at a minimum, genuine issues of fact exist as to whether Jaime San Miguel, her immediate supervisor, orchestrated a concerted campaign over a six day period to remove Mrs. Johnson (a fifty year old woman with parental responsibilities) from her position as Lead Assistant manager in the Apparel Department at the Juneau Fred Meyer Store in order to replace her with a pretty 23 year old single woman with no children. Genuine issues of fact exist as to whether Mr. San Miguel and Fred Meyer discriminated against Mrs. Johnson because of her age and parentage.

Defendants' Motion for Summary Judgment is largely conclusory and fatally myopic, avoiding discussion of the long and rich relationship between the defendants and Myrna Johnson. For example, with no basis whatsoever, defendants assert that the employment relationship was "at will". A cursory examination of all of the documents describing employment with Fred Meyer confirms that not once is the phrase "at will" used or a description of the employment relationship being solely dependent to the employer's whim.

Instead, "career" is the operative word at Fred Meyer. It is used continually throughout all documents describing Myrna Johnson's employment relationship. In addition, progressive discipline is promised to employees – something not expected in an "at will" relationship.

It can be anticipated that defendants will argue that whether the employment was "for cause" or "at will", that ultimately it didn't matter, because with the same level of conclusory reasoning as that which characterizes the rest of their brief, they assert Ms. Johnson "walked-off" her job and as such "voluntarily quit" her 10 year career with Fred Meyer.

1 First, genuine issues of fact exist as to whether the employment was relationship was
2 “for cause” as opposed to “at will”. Fred Meyer’s deliberate omission from any employment
3 document or discussion of the term “at will” or inclusion of something resembling the
4 definition of “at will” employment demonstrates that the employment was “for cause”.
5 Genuine issues of fact exist as to what representations Fred Meyer made to Ms. Johnson and
6 other employees as to the “for cause” nature of their employment relationship. The jury can
7 conclude in this matter based upon Fred Meyer’s own writings and representations that Ms.
8 Johnson was employed “for cause” and that “cause” did not exist for her termination.

9 Second and alternatively, if the jury concludes that Ms. Johnson had an “at will”
10 employment contract with Fred Meyer, there are genuine issues of fact which if found in her
11 favor would support the conclusion that the defendants breached the covenant of good faith and
12 fair dealing.

13 Ms. Johnson did not “walk-off” her job. She left a room sobbing uncontrollably after
14 suddenly discovering that her career was ending, that she was at an end stage of discipline with
15 no prior warnings and that despite knowing how to do her job and doing it well, nothing would
16 satisfy Mr. San Miguel. Plaintiff submits that a reasonable person could easily conclude that
17 Ms. Johnson was set up, that Mr. San Miguel orchestrated the meeting on March 18, 2002 for
18 no other purpose than to replace Ms. Johnson with Ms. Havard.

19 The jury can easily find based upon the extensive and largely undisputed record that the
20 defendants made a decision while Ms. Johnson was on emergency leave that (1) she was no
21 longer reliable because she had to take time off for a family crisis; and (2) that she would be
22 replaced by Ms. Havard, a young, pretty and single woman who had told Mr. San Miguel she
23 was interested in Myrna Johnson’s job.

24 Given the extensive record in this matter, genuine issues of fact exist as to whether
25 Myrna Johnson’s termination for “walking-off” the job on March 18, 2002 was in breach of her
26 employment agreement; was in breach of the covenant of good faith and fair dealing and was
27 done for reasons that were in violation of both federal and state protections against
28 discrimination because of age and parentage.

These genuine issues of fact preclude summary judgment on Ms. Johnson’s claims for (1) violation of the Age Discrimination in Employment Act (“ADEA”); (2) harassment and wrongful discharge in violation of the Alaska Human Rights Act on the basis of age and parental status; and (3) state common law claims for wrongful discharge under either a “for cause” employment contract; or alternatively, for “at will” breach of the covenant of good faith and fair dealings.¹

In 1992, Fred Meyer and Myrna Johnson entered into an employment contract with defendant Fred Meyer. Fred Meyer promised to provide Ms. Johnson with a career, promising her job security and ever increasing pay raises and promotions if Ms. Johnson performed her job well and met all requirements for advancement within the Fred Meyer organization. Throughout that employment, to induce her to spend the enormous amounts of time required to be promoted to management and work as a manager, Fred Meyer made numerous representations to her, both orally and in writing, that she would be treated fairly and consistently with its internal disciplinary processes.

¹ As noted earlier, Ms. Johnson withdraws her claims of gender discrimination under Federal and State law, violation of the federal Family and Medical Leave Act (“FMLA”) and tortious interference with business relations.

1 In March of 2002, over a period of just six days, her career was terminated by the actions of
2 defendant Jaime San Miguel, her immediate supervisor with the knowledge and consent of Fred Meyer
3 upper-level management. The defendants wanted to replace Ms. Johnson for two improper reasons.
4 First, Mr. San Miguel wanted to replace Ms. Johnson, an older, married woman over the age of 40, with
5 a younger (age 23), pretty and single woman, Johnna Havard. Second, because Ms. Johnson had taken
6 time off to take care of her teenaged daughter and told Mr. San Miguel she might have to do so again
7 the following Fall, the defendants decided her parental status made her unreliable and as such, in need
8 of replacement. Ms. Havard, who had earlier expressed interest in Ms. Johnson's job if it came open,
9 was single and had no children to distract her from the job.

10 In order to remove Ms. Johnson from her position as Lead Assistant, Mr. San Miguel needed to
11 have her either terminated or demoted. To accomplish this, he orchestrated a campaign of daily and
12 unceasing oral and written complaints and harassment which terminated in less than one week in an
13 emotional confrontation with Ms. Johnson trapped in a small, confined space with San Miguel and Fred
14 Sayre, both large men.

15 Ms. Johnson began sobbing uncontrollably as Mr. San Miguel demanded she sign a Written
16 "Employee Warning Notice", an advanced form of discipline which threatened her removal from her
17 position as Lead Assistant. This form of discipline normally only occurs after other progressive
18 discipline is accomplished. Since there had been none and Ms. Johnson had worked unceasingly and
19 unsuccessfully for the prior six straight days to respond to San Miguel's escalating complaints, she
20 knew that he was going to have her fired or demoted.

21 Overwhelmed with the loss of her career and the series of events over less than a week's time
22 which had allowed Mr. San Miguel to accomplish this, Ms. Johnson began sobbing uncontrollably.
23 Deeply embarrassed and humiliated, she told the men she had to leave the room and did so in an effort
24 to collect herself emotionally. She did not hear Mr. Sayre state that if she left the room that it would be
25 considered a voluntary "walk off" from the job.

26 While Ms. Johnson went downstairs to continue crying in the Apparel stock room, Mr. San
27 Miguel and Mr. Sayre called the Portland headquarters for Fred Meyer, where the decision was made to
28 describe Ms. Johnson's tearful exodus from the room as a "walk-off" from the job and "voluntary
termination". When Ms. Johnson, after collecting herself emotionally, prepared to return to work the
following morning she learned to her surprise, that she had been terminated.

III.

A Description of the Parties

Johnson, Myrna v Fred Meyers (03/18/2002) [23003].

7

OPPOSITION TO MOTION FOR SUMMARY JUDGMENT
J-04-008 CV (RHB)

1 A. Myrna Johnson

2 Myrna Inductivo Johnson is a 53 year old woman (dob: 09/23/52) of Philippine national origin.
3 Like many immigrants from the Philippines, she is well educated having both a high school degree and
4 a Bachelor's of Arts in English from Manual Luiz Quezon University in Manila. Prior to coming to
5 the United States, she was the production manager for Cristobal Manufacturing, a successful family
6 business in the Philippines.

7 Ms. Johnson was abandoned by her first husband in the Philippines in 1984 and was solely
8 responsible for providing for their three daughters. She met Russell Johnson while visiting relatives in
9 the United States. His promise to love her daughters like they were his own was the key to her heart.
10 They married in April 1988 and she immigrated to the United States, moving to Juneau in the Fall of
11 1992.²

12 Soon thereafter, she applied for work at the Juneau Fred Meyer Store, starting part-time as a
13 shoe sales associate. In the following decade, she rose steadily within the Apparel Department, with the
14 stated purpose from the outset of being "promoted" and having a career with the company. By March
15 of 2002 she had received extensive training and had a demonstrated history of being able to successfully
16 do her job as the Lead Assistant Manager.

17 B. Fred Meyer Stores, Inc.

18 Defendant Fred Meyer Stores, Inc. is a part of The Kroger Co., one of the largest grocery chains
19 in the country with more than sixty billion in annual sales. There are a 128 Fred Meyer Stores, called
20 "multi-department stores" by Kroger, averaging 150,000 square feet and offering 225,000 food and non-
21 food products. They require an average investment of \$24.5 million.³ Fred Meyer operates stores
22 throughout Alaska, Washington, Idaho and Oregon with corporate headquarters in Portland. In the
23 Portland area alone, Fred Meyer employs more than 30,000 people.⁴

24 Employment with Fred Meyer normally begins with part-time employment. Full-time
25 employment is usually not available to starting employees but rather is a reward once a part-time
26 employee demonstrates satisfactory performance. Fred Meyer hires "from within" and there are
27

28 ² Exh. 1 – Myrna Johnson Affidavit

³ Exh. 2 – Kroger Co. Description of Fred Meyer Store – from World Wide Web

⁴ Exh 3 – http://www.workforcepartners.org/display_one.cfm?ID=147

1 numerous manuals and training materials that employees must read and be tested upon in order to be
2 eligible for promotions.

3 C. Jaime San Miguel

4 In September, 1991, Mr. San Miguel took a part-time job at the Airport Way Fred Meyer as a
5 shoe sales associate.⁵ In less than five years, March of 1996, he had been promoted to the Lead Assistant
6 Manager for Apparel in the Juneau Store.⁶ He was subsequently promoted to Manager in 2001.

7 Mr. San Miguel went through a turbulent and emotionally exhausting divorce in the Spring and
8 Summer of 2001. His attendance was erratic. He would come late and leave early.⁷ He would break
9 down crying at times.⁸ During that time period, less than a year prior to Myrna Johnson's termination,
10 it was Mr. San Miguel who relied upon to do his job.⁹ A review of Mr. San Miguel's personnel file
11 confirms that there were no disciplinary consequences to his erratic performance and attendance during
12 that time period even though Fred Meyer management were aware that he was having problems.

13 Mr. San Miguel always made it clear that preferred younger women, both as employees and as
14 potential dating partners. Once divorced, Mr. San Miguel became even more explicit in discussing his
15 sexual interests with subordinates, asking female employees to set him up with someone who was
16 "hot". His discussions centered on sports and "girls". Because he was a baseball buddy of the Store
17 Manager, Fred Sayre, he was seen to be part of a "good old boys network" that was inaccessible to his
18 largely female staff.¹⁰

19 When Ms. Johnson had to return to the Philippines in early February 2002 with her daughter
20 Melissa on emergency leave, Mr. San Miguel, in describing the replacement he wanted, said "*if it is a*
21 *woman, send somebody young and beautiful...and not a hag.*"¹¹

22 IV.

23 Undisputed Facts

24 A. December 1992 to March 11, 2002 - Johnson's Work History With Fred Meyer

25 In December 1992, Myrna Johnson interviewed at Fred Meyer Store in Juneau, Alaska and was
26 hired as a part-time salesperson in the shoe department. Her Employment Application describes her
27

28 ⁵ Exh. 4 – Jaime San Miguel Depo Transcript [JSM Tr]. 33/19-25.

⁶ Exh. 4 – [JSM Tr. 74/17-22].

⁷ Exh. 4 – [JSM Tr. 108/24 – 110/2].

⁸ Exh. 4 – [JSM Tr. 110/3 – 9].

⁹ Exh. 4 – [JSM Tr. 110/18 – 111/11].

¹⁰ Exh. 5 - Sallie Tenwolde Affidavit; Exh. 59 – Drodody Letter.

¹¹ Exh. 6 - Sarah Dexter Affidavit - p. 2.

1 Scheduling Preferences as “available for work – *anytime – can work anytime*. She was paid
2 \$8.50/hour.¹² While she sought full-time work, it was not available. She was told she would have to
3 perform satisfactorily in order to earn the right to work full-time.

4 She was dedicated and unusually hard working. She was promoted to full-time as Manager of
5 the Shoe Department in May of 1993 (less than six months since starting part-time) receiving a 30% pay
6 increase. She maintained that position till 1994 when she took a full-time job with the State of Alaska
7 while continuing to work part-time for Fred Meyer as a closing supervisor of the shoe department at the
8 same hourly rate she had received as a full-time employee.¹³

9 In September 1996, Matthew Laney, manager of the Apparel Department at the Juneau Store,
10 told her that he would train her for the position as Relief (2nd) Assistant Manager for the Apparel
11 Department. It was a career position (management),¹⁴ offering more potential for responsibility,
12 promotion and better income than she could obtain from the State. Ms. Johnson left her job with the
13 State to begin full-time as a management trainee at the Fred Meyer Store in Juneau. She went through
14 the training program for Relief Assistant Manager including on-the-job training and completion of a
15 written training manual under the direct supervision of Mr. Laney. She received approximately a
16 twenty percent (20%) raise when promoted to that position.¹⁵

17 For the next four and a half years, Ms. Johnson worked as the Relief Assistant Manager, The
18 Lead Assistant, or First Assistant Manager, was Jaime San Miguel. The Apparel Manager was Matthew
19 Laney. As the Relief Assistant, she received the least desirable shift, the closing shift, from 2:00 p.m.
20 till closing. For the entire time she held that position, four and one-half years, she closed the Apparel
21 Department at Fred Meyer, successfully performing those job duties which included completing
22 “recovery”, (preparing and straightening the store shelves and racks so that the store would be ready the
23 next morning), assembling planograms, (product specific displays that appear the same in all stores),
24 and otherwise being responsible for the successful closing of the Apparel Department. Not only did she
25 never receive any discipline, her customer service was recognized as being exceptional.¹⁶

26 Fred Meyer Store hours are long. In the summers, the store opens from 7:00 a.m. to midnight.
27 In the winters, the Store is open from 7:00 a.m. to 11:00 p.m. Management employees are expected to
28

¹² Exh. 7 – Employment Application [200001]

¹³ Exh. 8 [200135]

¹⁴ Exh. 14 – Store Management Career Paths – [200315]

¹⁵ Exh. 1 – Myrna Johnson Affidavit

¹⁶ Exh. 1 – Myrna Johnson Affidavit

work at least ten hour shifts during normal times and during the holiday seasons, twelve hour shifts, seven days a week are not uncommon. Fundamentally, managers are expected to do whatever it takes to make the store work, irrespective of their personal needs or schedules. The closing manager leaves when the job is done, often requiring work till midnight or later.¹⁷

In her May 12, 1997 Performance Appraisal, her Manager, Matthew Laney described the progress she had made towards “continuing self-development” as: “Myrna exhibits a strong desire to learn and perform well, she handles short-comings in a non-defeating, self-improving manner.”¹⁸ In her self-appraisal, Ms. Johnson described her career goals and aspirations as: “To stay on top of my job, and be ready for promotion & future challenges.”¹⁹

In her June 2, 1998 Performance Appraisal, her supervisor, Matthew Laney, wrote “Myrna has a strong desire to learn, grow, and get promoted. Myrna has improved in meeting the needs of the ALE Dept and providing support.”²⁰ On the same evaluation, when asked for her career goals and aspirations, she wrote “My career goals are to stay & be promoted on my job. To learn 100% and be very effective in the execution of all the job responsibilities required. Will try very hard this year to meet more than expectations next year.”²¹

In her May 1999 Appraisal, which again showed her as “Meets Expectations” with “Very Good – An Example to the Store” in the area of Customer Service, Ms. Johnson wrote that she wanted to “gain more training and experience to be very confident in my job. I am committing myself to meet all the expectations.”²²

Her May 10, 2000 Appraisal, again by Matthew Laney, demonstrated her continued efforts at improving her managerial skills:

- “Myrna supported the team efforts on the day to day working end of the goals and expectations. Her consistent performance was key in achieving these goals.”
- “Myrna expanded and increased her understanding of hiring and training skills for new employees.”
- “Myrna has an exceptional talent in developing a team effort and work level amongst the employees she directs.”²³

¹⁷ Exh. 1 – Myrna Johnson Affidavit

¹⁸ Exh 9 - [201179]

¹⁹ Exh 9 - [201182]

²⁰ Exh. 10 - [200033]

²¹ Exh. 10 - [200036]

²² Exh 11 - [201190]

²³ Exh. 12 - [200046]

Her excellent Customer Service abilities were again given a “Very Good.” In this evaluation, her last as a Relief Assistant Manager, she wrote: “I want to stay focused in this job, get promoted someday and gain more respect from co employees and achieve more goals and responsibility.”²⁴

In February 2001, Matthew Laney left Fred Meyer and Jaime San Miguel was promoted from within to replace him. Ms. Johnson was thereafter promoted from within to take over Mr. San Miguel’s position. In her June 12, 2001 Performance Appraisal, prepared by Mr. San Miguel, he writes in regards to her Customer Service “Myrna always leads by example.” Under Commitment to Excellence, he wrote: “Myrna is learning her new job. Mgr is confident of her skills. Seek info if needed.” Under Teamwork, he wrote: “Great team player! Asset to my team.”²⁵

In the small section set aside for the employee’s job aspirations, Johnson wrote: “I want to learn more and (be) trained more for future promotions. I am very happy with how my career is heading.”²⁶

Similarly, in her Performance Self-Appraisal Form dated 06/20/01, she described her greatest strengths as: “My dedication to the job no matter what it takes. My ability (to) perform multiple tasks (in a) limited period of time. My ability to make quick decisions if needed. The friendship that I gained from the employees and that they are willing to help at all times.”²⁷

In response to the question – In what areas do you need assistance? She responded “I need more training to prepare myself for future promotions.”²⁸ In response to the question, “Are you satisfied with the direction you see your career taking with the company?” Her response was “Yes”. This was eight months before her termination.

She continued to work from June of 2001 to January of 2002. Her work continued to be exemplary. There were no complaints or concerns about her ability to do her job or to perform routine tasks such as “recovery” or the set up of “planograms”. In January 2002, she took her annual vacation to the Philippines to be with her extended family there.

Soon after her return from the Philippines in early February, her daughter ran away. For three days, she and her husband searched Juneau finally finding their daughter in an apartment downtown mixed up with a very bad crowd. There were concerns with substance abuse. Her teenaged daughter, Melissa, threatened suicide. The doctor advised Ms. Johnson and her husband that their daughter would

²⁴ Exh. 12 - [200049]

²⁵ Exh. 13 - [200058]

²⁶ Exh. 13 - [200059]

²⁷ Exh. 13 - [200054]

²⁸ Exh. 13 - [200393]

1 have to be supervised 24 hours a day. Anything less would result in her either running away or harming
2 herself. The decision was made to take her to the Philippines where the large extended family could
3 provide 24 hour supervision. Ms. Johnson flew back with her daughter spending the better part of a
4 month watching her, helping her and the family transition to this new and urgent situation.²⁹

5 She returned to Juneau on Sunday, March 10, 2002 and was immediately put on the closing
6 schedule to start working on Tuesday, March 12, 2002. Six days later, on March 18, 2002 she was
7 terminated from her job.

8 B. Fred Meyer's Employment Agreement With Myrna Johnson - Oral & Written
9 Representations

10 When Myrna Johnson first interviewed for a job with Fred Meyer, she completed an
11 Employment Application. No where in that document is there any statement that her employment was
12 to be "at will."³⁰

13 At the time of her initial employment application (11/30/92) she was also given the PSI Test. It
14 appears to be designed to target whether the prospective employee has the right attitudes for the job in
15 regards to drug and alcohol usage, theft, dishonesty, etc.³¹ In that document, Ms. Johnson was asked
16 why she was seeking employment with the company. Her answer was succinct: "I want to work in a
17 company that has room for promotion and has job security."³²

18 Annually subject to Salaried Employee Performance Appraisals, those forms do not contain one
19 mention that the employment is "at will." Instead, the documents necessarily look prospectively
20 towards how the employee can do a better job for the company and how they can improve as a manager.
21 Each Appraisal ends with a request for the employee to describe their "career goals and aspirations."

22 In Ms. Johnson's 1997 Performance Appraisal, a series of questions were asked.³³ Three
23 questions specifically address the employee's perspective of his or her long-term relationship with the
24 company. Question 10 asks for general comments regarding "current promotion, career path and future
25 accomplishments. Question 13 asks if the salaried employee is willing to "relocate for promotional
26 opportunities and for increased duties and responsibilities". Question 14 asks if the employee is

27 ²⁹ Exh. 1 – Myrna Johnson Affidavit.

28 ³⁰ Exh. 7 - [200001]

³¹ Exh. 15 - [201262-201269]

³² Exh. 15 - [201270]

³³ Exh. 9 - [201183-201184]

1 “satisfied with the direction you see your career taking with the company?” Ms. Johnson’s answers in
2 1997 all reflect an intention and plan to have a career with Fred Meyer.³⁴

3 Fred Meyer relies upon two primary manuals to describe the employment relationship with its
4 employees; the Employee Handbook and the Fred Meyer Corporate Policy Handbook. The Employee
5 Handbook³⁵ does not contain one mention of either the phrase “at will” employment or otherwise, in a
6 clear and concise manner, advise Fred Meyer employees that they are “at will”. In contrast, it mentions
7 “career” repeatedly and is clearly designed to provide new employees with the belief that if they work
8 successfully at Fred Meyer, that they will be treated fairly. Fred Meyer explicitly recognizes that
9 “*skilled, capable and dedicated employees are essential, for the overall success of our business is
determined by the combined ideas, work and effort of all Fred Meyer employees.*”³⁶ For example, under
the heading “Career Opportunities”, the following description is found:

10 “You’ll find we support promoting from within the Company whenever possible at Fred Meyer.
11 During your time with the Company, there will be opportunities for advancement and many
12 career options available. You may decide that you would like to work for another part of the
13 Company. With a company as large and diverse as Fred Meyer, your career options aren’t
14 limited to just one division. We frequently promote people from the store to regional and
15 corporate positions. *Your advancement will be based on your performance and willingness to
learn and grow. Ultimately, you are in charge of your career at Fred Meyer. You are
encouraged to meet with your supervisor to discuss your career goals and aspirations.*”³⁷
(emphasis added)

16 The second manual describing the employment relationship and mutual expectations and
17 responsibilities is the “Fred Meyer Corporate Policy Handbook”.³⁸ This manual, consisting of
18 hundreds of pages of information, describes in detail employee responsibilities and consequences. In no
19 place does it describe employment with Fred Meyer as being “at will” or that an employee can be
20 discharged *without cause*. In fact, discharge is always described as a consequence of either a violation
21 of some policy or when “necessary to protect the well-being of the company or its employees.”
22
23

24 ³⁴ Exh. 9 - [201184]

25 ³⁵ Exh. 16

26 ³⁶ Exh. 16 - [201427]

27 ³⁷ Exh. 16 - [201433]

28 ³⁸ Exh. 17 - [200557-200971]

1 Violation of a Fred Meyer policy almost always can have a disciplinary consequence, up to
2 termination.³⁹ There simply is no need for such consequences if employees cannot expect the corollary;
3 if they follow the policies, they will not be subject to discipline including possible termination.

4 One of the reasons why Fred Meyer goes to such extraordinary efforts to describe both its
5 policies and the consequences of their violation is because of the extensive amount of training and
6 investment necessary to develop skilled employees. This is especially the case for managers. Many
7 managers start “at the bottom”, working their way up through ascending levels of expertise and
8 responsibility, all requiring extensive amounts of on the job training as well as the study of written
9 materials and the passing of tests or evaluations by supervisors.

10 Fred Meyer created an extensive training program with written materials in order to train its
11 employees so that they could be promoted from within the company. In the Apparel division (ALE),
12 there were 4 levels of managers; Fourth-in Charge/PIC; Relief Assistant (also called 2nd Assistant); Lead
13 Assistant Manager (also called First Assistant) and Manager.⁴⁰

14 In order to maintain consistency and quality throughout its chain of stores, Fred Meyer created
15 its own system of in-house professional training for these positions with extensive job descriptions and
16 training materials.

17 In order to be hired or promoted to a Relief Assistant Manager, one must complete the ALE
18 (Apparel) Relief Assistant Training Program.⁴¹ While the program has 220 pages of written materials,
19 the two page Performance Requirements Chart provides one with a good idea of the broad variety of
20 tasks which must be mastered in order to be the Relief Assistant Manager (2nd Assistant).⁴²

21 ³⁹ Exh. 17 - Violation of the Job Posting Program’s “Promotion from Within the Company” policy; [200577]
22 Violation of the Equal Employment Opportunity policy; [200583 & 200633] Violation of the Conflicts of Interest
23 policy (employment or relatives); [200601] Violation of the Hiring People with Disabilities policy; [200603]
24 Violation of the Hiring Minors policy; [200607] Violation of the Hiring Independent Contractors policy; [200617]
25 Violation of the Hiring School to Work policy; [200629] Violation of the Rehiring Former Employees policy;
26 [200637] Violation of the Transfer, Interview and Selection Process policy; [200639] are examples of this.

27 ⁴⁰ Exh. 14 - Fred Meyer Store Management Career Paths – [200315]

28 ⁴¹ Exh. 18 – ALE (Apparel) Relief Assistant Training Program.

⁴² Exh. 18 - [201576-201577]

1 There is also an ALE Assistant Manager Training Program.⁴³ A prerequisite to starting it is
2 completion of the Relief Assistant Training Program.⁴⁴ A review of that manual confirms the extensive
3 amount of training required *before* someone can become the Assistant Apparel Manager.

4 There is also a job description for the ALE Assistant Manager. It describes the primary purpose
5 of the position as:

- *Assist in the management of the department, maximize all financial opportunities and assume the management responsibilities in the absence of the manager.*

6 The job description then has a long list of the essential duties and responsibilities of the
7 position:

- Provides Customer service
- Reacts with urgency to changing sales opportunities
- Ensures compliance with the divisional signing standards
- Ensures compliance with divisional recovery standards
- Coordinates and organizes merchandising of the department floor
- Implements and audits ads
- Ensures compliance with divisional recovery standards
- Coordinates and organizes merchandising of the department floor
- Implements and audits ads
- Ensures compliance with planograms
- Coordinates the implementation of weekly Merchandise Specialists Notes, Off-Shelf Merchandising Notes, and Period Planners to complete merchandising assignments
- Assists in preparing the seasonal critiques
- Identifies current market trends
- Maintains an awareness of the competitors activities in the specific market area
- Ensures implementation of visual merchandising standards
- Ensures compliance with the divisional folding/hanging standards
- Ensures compliance with the standards for fixtures usage and maintenance
- Ensures compliance to the stockroom standards
- Ensures the accuracy and follows up on price changes
- Maintains and audits the in-store Price Change Control Log
- Ensures compliance with the ticketing standards
- Authorizes any manager discretion markdowns
- Audits and takes appropriate action on scan audits
- Audits and takes appropriate action on alpha code documents and in-store Price Change Recap
- Audits and takes appropriate action on Report Code 10, Report Code 20, and the ECR Override Report

⁴³ Exh. 19 - [201680 – 201825].

⁴⁴ Exh. 19 - [201736]

- Audits and takes appropriate action on missing markdown and markdown exception reports
- Audits and takes appropriate action on file maintenance exceptions
- Demonstrates, recognize, and ensures compliance with the Q and SAM actions
- Ensures compliance with the corporate dress code policy
- Sells products to Customers; teaches/demonstrates selling skills
- Performs cashier functions, when required
- Participates in mandatory training programs
- Audits cashier proficiency and related reports
- Ensures compliance with labor agreements, when applicable
- Maintains an awareness of overstock/understock conditions to ensure ordering system integrity
- Ensures compliance with freight receiving and freight stocking standards
- Completes daily tours
- Adjusts the schedule/15 minute charts
- Records daily sales
- Orders department supplies
- Responds to verbal Customer comments/complaints/requests
- Ensures daily and weekly time and attendance functions are completed
- Identifies and takes appropriate action on maintenance/repair needs
- Completes Customer incident and employee incident/accident report forms, when necessary
- Ensures compliance to all safety guidelines and standards
- Ensures compliance to the quality ordering functions/RMS updates
- Audits salvage procedures
- Audits and follows up on written distribution center returns, weekly WDCR recaps, and Returns to Suppliers
- Reviews on-line sales information and takes appropriate action
- Assists in the inventory process
- Audits the vendor logs
- Ensures compliance to shipping/receiving procedures, including auditing the Shipping/Receiving Log)
- Approves Intersection Transfers
- Ensures compliance with the shrink control guidelines
- Promotes employee participation in the Fred Meyer Incentive Award Program⁴⁵

One cannot be promoted to this position until demonstrating competence in all of the above areas.

C. Six Days That Ended A Career: March 12, 2002 to March 18, 2002

⁴⁵ Exh. 20 – [200089 – 200094]

March 12, 2002 (Monday): On March 12, 2000, Myrna Johnson clocked in for work at 1:11 p.m.⁴⁶ She was in charge of closing the store that evening so would work until at least midnight. When she arrived, she learned from Mr. San Miguel that they were very short-handed in terms of experienced personnel. Charlene Fontenot, the Relief (2nd) Assistant, had injured her back and would not be back until March 15th at the earliest. Jeff Furber, a full-time PIC had been terminated. Johnna Havard, a Relief (2nd) Assistant from the Wasilla Store was going to help out at the Spring Reset. In that same conversation, Ms. Johnson mentioned that if her daughter had to stay in the Philippines for a long period of time, she might have to take a six month family leave, but that this wouldn't be happening soon and she would give him at least one month's notice. She told him she might decide this before the end of the calendar year.⁴⁷

On that same day, he gave her a Tour (a "to do" worksheet) dated March 13, 2002.⁴⁸ Ms. Johnson assumed that was because he expected it to be turned in the same day. He also asked her to finish 3 carts of transfer Docker™ pants to the Fairbanks store.

At 10:48 p.m. that same evening she advised Mr. San Miguel that she had finished the transfer of the Docker pants, submitted check cashing violations and that "read and signs (were) in progress."⁴⁹

That same evening, Ms. Johnson was advised by Julita Lim, a part-time PIC, that she was having problems with completing a baby furniture planogram. A planogram is a display system which includes a complete description of how a product or product line is to be displayed, all of the assorted materials necessary for the display and normally includes all of the UPL (Universal Product Label) codes. Ms. Lim told Ms. Johnson that Mr. San Miguel had told her to finish the Planogram because Minerva Cortez, who had originally been assigned to do it, didn't want to do it.⁵⁰

Though a long-term employee, Ms. Lim had little experience with setting up planograms and Ms. Johnson immediately saw that the planogram materials were missing UPL codes which are necessary for the planogram to be completed. The UPLs can be typed manually but the simpler and more efficient method is to order them from Portland. She ordered them from Portland and advised Mr.

⁴⁶ Exh. 21 - [201176-201177]

⁴⁷ Exh. 22 - [300514]

⁴⁸ Exh. 23 - Tour - [200421-200422]

⁴⁹ Exh. 24 - [300513]

⁵⁰ Exh. 22 - [300514]

San Miguel by an Office Vision at 11:39 p.m.⁵¹ Ms. Johnson left the store after midnight her first evening back.

March 13, 2002 (Wednesday): On March 13, 2002, Ms. Johnson again clocked into work early, at 1:17 p.m.⁵² Mr. San Miguel, who apparently was not on the floor, sent her an Office Vision just 17 minutes later at 1:34 p.m. stating:

"Have Minerva or Julita complete this planogram TONIGHT. It's been a week, can't wait any longer. I want this done tonight, have them make the upl a store level. All displays need to be sensor tag, with a scanning upl on the back bottom left, top bar worked. I'm going to scan zeroes in the am." (emphasis in original)⁵³

Eight minutes later, at 1:42 p.m., while he and she were both in the store, he sent her a second Office Vision complaining (in writing) about the quality of the recovery the prior evening:

"Please see me about recovery last night. Lots of areas were not recovered to standard (mens dockers table/acs backpacks). Recovery was coming along nicely the last couple weeks. Last night we took a step backwards. This morning Fred called me to the men's section to walk the ale dpt, I was embarassed by the conditions in some areas. This is not acceptable any longer, expectations are a lot higher now, especially when the lead asst is closing.

You need to walk all areas with the closing crew to ensure that recovery gets done every night. Also make sure everybody crosses out the tour as they get it done. AS part of your closing duties leave a detail ov about who work each area and what they work on throughout the night."⁵⁴

Ms. Johnson went to him to apologize if her recovery "(was) not excellent." She explained that they were busy, it was her first day back and there were "so much things to do."⁵⁵

She also received the Office Vision about the planogram. He wanted it done on the evening of March 13 even though he had given "another long tour" to Minerva Cortez. Because Cortez was obviously going to be too busy to complete the planogram, Ms. Johnson started it.⁵⁶

March 14, 2002 (Thursday): Ms. Johnson worked past midnight to complete the planogram, sending an Office Vision to Mr. San Miguel at 12:38 a.m. on March 14 that she had completed it but because of the time, would have to take care of some cleaning and straightening the following day:

⁵¹ Exh. 25 - [201174 (Bottom of Page)]

⁵² Exh. 21 - [201177]

⁵³ Exh. 25 - [201174 (Top of Page)]

⁵⁴ Exh. 24 - [300513 (Top of Page)]

⁵⁵ Exh. 22 - [300514]

⁵⁶ Exh. 22 - [300514]

"I finished the planogram for the baby furniture deck. I will check for back stock tomorrow. ...will straighten the other side tomorrow (shelf)

I hope that my recovery is up to standard this time.

Most of the tour for the night was done. Thanks, Myrna"⁵⁷

Later that morning, at 11:17 on March 14, 2002, Mr. San Miguel forwarded an earlier Office Vision originally dated March 6, 2002 to Myrna Johnson. The subject was "Excellence in Execution":

"We have a huge opportunity to drive sales and improve our profitability by (indiscipherable) EXECUTION of the plan directed by management. There are several items in ALE that I have personally discussed with all of you on previous meetings and we still struggle to get it done to standard in a timely manner. We can't continue to operate like this, I need all of you to hug and embrace your dpts and all changes.

I know there is a lot going on, but we need to be focused on sales planning, execution and follow up. Taking a week to get something done, is not in the schedules lined out by DXA on previous communications. Enough said; If you are executing the plan/tours/bulletins/s&mnotes/ thank you; If not DIG IN only two kinds of employees survive in retail.. The Fast and the Furious."⁵⁸

After working almost twelve hours the previous day (having left after midnight), she clocked back into work at 1:20 p.m.⁵⁹ Johnna Havard, who was scheduled to work the early morning shift, called in sick. Ms. Johnson had to straighten out the CHL section because of Ms. Havard's absence. The store was very busy again.⁶⁰

That afternoon she was called into Mr. San Miguel's office where he told her that a lot of spots were missed the night before. He showed her a long list of the spots and then inexplicably showed her photos of bad recoveries that occurred while she was gone. He said her recovery was better than those that occurred while she was gone but that she had still missed "spots".⁶¹ He gave her a three (3) page Tour with work to be done on that day.⁶² [200423-200425]

⁵⁷ Exh. 26 - [201248 (Bottom of Page)]

⁵⁸ Exh. 27 - [201251]

⁵⁹ Exh. 21 - [201177]

⁶⁰ Exh. 22 - [300514]

⁶¹ Exh. 22 - [300514]

⁶² Exh. 23A - Tour (03/14/02) - [200423-200425]

Ms. Johnson explained that they had been very busy the night before. Mr. San Miguel reiterated that they must follow standards and if someone was going to lose their job, it would not be him. He then mentioned that he knew she was having some family problems. Ms. Johnson asked that he please not involve her family situation – that she had been in the store the preceding day from 1:30 p.m. (actually 1:20 p.m.) to almost midnight (actually to 12:48 a.m.), hadn't even taken a lunch, so didn't feel that her work performance had been affected by her daughter's situation.⁶³

Mr. San Miguel then said he didn't like the way she had set up the baby furniture deck planogram even though Ms. Johnson had set it up "by the book" as taught and previously instructed by Mr. San Miguel. This time he wanted something different. Because he changed the requirements and wanted something different than what was specifically called for in the planogram instructions, she spent the whole evening making new UPL(s) and adjusting the planogram.

Ms. Johnson left Mr. San Miguel's office "very sad". That evening she explained to the night crew Mr. San Miguel's complaints about the recovery. Those employees were unhappy because like Ms. Johnson, they had felt they had done a good job the night before.⁶⁴ Despite the confusion created by Mr. San Miguel's sudden disapproval of everything she was doing, she continued to do her job, working late again that evening.⁶⁵

At 10:07 p.m. she sent an Office Vision to Mr. San Miguel giving him an update on her progress:

"I fixed the baby furniture deck as much as I can. Those items on the top were supposed to be for display. I ran out of time to vacuum (sic) and built the display. I will finish them tomorrow.

I tried to type UPL for the end cap printer not working. I had been very busy tonight. Minerba and I were both back up at SG20.

I talk to all the night crew tonight and we are committing to our goal of excellence. We will work on perfection every night. Give us a little time to straighten everything and we will get there.

Thank You,
Myrna"⁶⁶

⁶³ Exh. 22 - [300514]

⁶⁴ Exh. 28 – [Paz Carillo Affidavit for ASHRC]

⁶⁵ Exh. 22 - [300515]

⁶⁶ Exh. 29 - [201216]

March 15, 2002 (Friday): Ms. Johnson returned to work on Friday, clocking in at 1:15 p.m. Ms. Havard got sick on the job and had to go home. Ms. Havard had been working on rearranging the children's section leaving a quick layout for Sita Catli and Sara Dexter on what to do. They were both lost when Johnson arrived so she helped them following Ms. Havard's layout. Once again, the store was very busy and Ms. Johnson worked till around midnight.⁶⁷

March 16, 2002 (Saturday): Ms. Johnson clocked into work at 1:33 p.m., starting her shift as the store was crowded with out of town shoppers and was having a 50% off clearance event. Ms. Havard told her when she arrived that the apparel (ALE) closing cashier, Jennifer Kipple, had called in sick. The only person with experience to replace Ms. Kipple on the closing shift was Julita Lim.⁶⁸

At 3:03 p.m., while Ms. Johnson worked clearance minus one cashier, Mr. San Miguel sent the following Office Vision to her:

"As of today 03/16/02, the Bfn planogram still not done 100% as outlined on the tour dated 03/13/02. This is unacceptable (sic)!!!!!! The front endcap still not signed, backstock not worked, snugride callback not completed, kick & play / 1st bouncer still out of place and no display set on top of the deck.....

You have till MONDAY 7:00am to complete this project. I will not accept anymore excuses on why isn't done.

Bfn: Tour: Planograms gondola/deck/deck end/ done all up. All backstock worked including boards on container/top bars/ stockroom. All displays set on the deck as per pogo. No bfn product left on ale stockroom/all have to go in to the container. Thanks Jaime"⁶⁹

Forty minutes later, at 3:43 p.m. Ms. San Miguel sent another Office Vision, with more work for Ms. Johnson:

"All these items have to be completed on sunday 03/17/07.

Ads in all depts. Set by 7:00 a.m. including outpost areas. All signing to standard.

Ads scan 100% by 9:00 am/Ad audit turn in to Fred

Top ten executed/Signed copy left on my desk

Stockroom clean and organized at closing time/All salvage done.

Checkstand ends set as per period planner.

Merchandising notes executed in all dpts. Copy to section heads/Sign master copy filed in the book.

⁶⁷ Exh. 22 - [300515]

⁶⁸ Exh. 22 - [300515-300516]

⁶⁹ Exh. 30 - [201309 (Top of Page)]

1 Clearance execution/All racks to the back of dpts or aligned on a row from front to back. All
2 clearance racks sized with rings and price pointed. Execute RTW clearance pricing (ov sent
separately).

3 All rms tables and sets recovered to planogram.

4 Don't forget to ov me every night with a passdown log. I want detail.

5 Thanks.

6 Jaime

7 PS – You forgot to ov the quest items to Steve and Joe Nichols.....Not good.....⁷⁰

8 Ms. Johnson, received two demanding Office Visions from Mr. San Miguel, while in the middle
9 of a major clearance sale and short her normal closing cashier. At 6:00 p.m. that evening, Julita Lim,
10 took her dinner break (normally one-half hour). She didn't return for almost two and one half hours.
11 Ms. Johnson was forced to work as back-up cashier, PIC and still try to finish all of the Tours and work
12 assigned by Mr. San Miguel. She worked till past midnight on Saturday evening.

13 Ms. Johnson subsequently was told by Ms. Lim that she had spent the extended dinner break
14 with Mr. San Miguel and Ms. Havard at a going away dinner for Ms. Havard. Mr. San Miguel was
15 aware that the shift was already one cashier short and that Ms. Lim's prolonged absence would require
16 that Ms. Johnson take care of Ms. Lim's duties plus Ms. Kipple's duties (the sick cashier), complete her
17 normal duties and comply with the two Office Visions received earlier that day.⁷¹

18 March 17, 2002 (Sunday): Ms. Johnson started work at approximately 1:30 p.m. Upon
19 arriving, she was met by Sara Dexter who told her that Mr. San Miguel had asked the day staff to report
20 to him about the quality of Ms. Johnson's recovery. Ms. Dexter warned Ms. Johnson that she should
21 "watch her back" because Mr. San Miguel was planning something against her. She told Ms. Johnson
22 that Johnna Havard had been very vocal about wanting to move to Juneau to be the Lead Assistant and
23 had started dating another Fred Meyer employee, Jeff Smith.

24 Rhonda Cox was interviewed by the Alaska State Commission for Human Rights on January
25 15, 2003. She confirmed that Mr. San Miguel had asked her to secretly send an Office Vision to him to
26 complain about the recovery. She stated that Mr. San Miguel would give "projects" to Ms. Johnson to
27 do at night when in fact, recovery was supposed to be the sole task.⁷²

28 ⁷⁰ Exh. 31 - [201310]

⁷¹ Exh. 22 – [300515]

⁷² Exh. 32 - [Rhonda Cox ASHRC Interview 1/15/03 p. 1 pp8].

Having received the warnings from Ms. Dexter, Ms. Johnson continued to do her work, doing her best to respond to the Office Visions sent by Mr. San Miguel on the 14th. In addition, on Sunday, all of the week's store specials have to be prepared for opening on Monday. This means that prices have to be changed and any special sale displays set up. The store places the advertisement in the Sunday paper for the week's sales. She was responsible for all of this plus cleaned the stock room and did all other things that needed to be done. Once again, she worked till almost midnight. In six days she had worked approximately 66 hours.

March 18, 2002 (Monday): On March 18, 2002, Ms. Johnson clocked into work at 1:17 p.m. She met with Mr. San Miguel briefly to update him on what had happened the day before. She updated him on all projects that had been assigned including finishing a shoe audit because it had not been completed by Jeff Smith. Smith had attended the dinner party with Mr. San Miguel the evening before, cleaning up the stock room and various odds and ends.⁷³

Mr. San Miguel had no comments about her progress or activities. Ms. Johnson took the store cell phone and went downstairs where she was met by Sita Catli who asked for assistance in completing a Levi's petite planogram. She was interrupted about half-way through the project by Mr. San Miguel asking her to come upstairs. He then sent her back down because he needed to take care of something and she returned to help Catli. She was then called back by Mr. San Miguel, passing Ms. Havard descending on the stairway as she went up.⁷⁴

Mr. San Miguel said that he wanted to meet with her in Fred Sayre's office (the store director). The office was small and cramped. Mr. Sayre sat at his desk with Mr. San Miguel hovering over Ms. Johnson's shoulder, between her and the door. With no preamble or discussion, he showed her a Written Employee Warning Notice and began reading the text of it to her. When he finished, he told her to sign it. The Written Employee Warning Notice was an advanced form of discipline, which only occurs after the employee has previously been through a series of less formal discipline including counseling, verbal warnings, and "written" verbal warnings. None of this had occurred. The notice stated that Ms. Johnson, who had worked till midnight or later for the last six days was unable to perform recovery and closing correctly and that she would be "removed from her position" as ALE Lead Assistant Manager if her work didn't improve in 30 days.⁷⁵

⁷³ Exh. 22 - [300516-300517]

⁷⁴ Exh. 22 - [300516-300517]

⁷⁵ Exh. 22 - [300516-300517]; Exh. 1 – Myrna Johnson Affidavit; Exh. 49- Employee Warning Notice. – [20217]

Ms. Johnson began crying,⁷⁶ intimidated by the circumstances and the small room with two large men. Mr. San Miguel stood blocking the door.⁷⁷ She had never had any form of discipline in the past⁷⁸ and could not understand how with no prior discipline taking place, she could suddenly be at a stage of discipline that was going to result in her termination or demotion. She began sobbing uncontrollably. It was clear to her that no matter what she did, no matter how long or diligently she worked, Mr. San Miguel was going to find reason to remove her from her position so that she could be replaced by Ms. Havard.

She continued crying, deeply embarrassed and humiliated to be trapped in the small room with Mr. San Miguel demanding she sign the written Employee Warning Notice. (In fact, signature is not required by the employee) Unable to collect herself emotionally, overwhelmed with the thought that she was going to lose her job and intimidated, she left the room to go to the Apparel Stock room where she continued to cry.

No effort was made by Mr. San Miguel or Mr. Sayre to talk with Ms. Johnson. No effort was made to see how she was doing.⁷⁹ In fact, no effort was made to advise her that the meeting could continue when she had some time to compose herself. Despite her ten years of work for Fred Meyer and her outstanding contributions and efforts, within minutes, Mr. San Miguel and Mr. Sayre had called Human Resources in Portland to report that Ms. Johnson had “walked off” the job when she left the room to cry in the break room downstairs.⁸⁰

Immediate steps were made to post Ms. Johnson’s hard earned job on the company’s internal system. Within days, Ms. Havard, 23 years old, young, pretty and single, had replaced Ms. Johnson. Ms. Johnson only learned that her position was in fact terminated when she called Time and Attendance the following morning to make sure that the time she missed from work on Monday afternoon and evening would be logged to her personal leave account.⁸¹

Since Mr. Sayre and Mr. San Miguel were bowling buddies and had participated in her termination, Ms. Johnson attempted to bring her wrongful termination to upper management as she had not “walked off” the job and had been mistreated by Mr. San Miguel. Her calls to both Dennis Affleck, the Regional Apparel Supervisor and Mary Lucas, at Human Resources, were initially unreturned. Mr.

⁷⁶ Exh. 33 – Myrna Johnson Transcript [MJ Tr] 125/25 to 128/6.

⁷⁷ Exh. 33 – [MJ Tr. 122/1-23].

⁷⁸ Exh. 4 – [JSM Tr. 100/19 to 101/1].

⁷⁹ Exh 4 – [JSM Tr 264/22 to 265/5].

⁸⁰ Exh. 4 – [JSM Tr. 257/1-18].

⁸¹ Exh. 22 - [300516-300517]

1 Affleck did eventually leave a voice message stating that he would not intervene and any concerns she
2 had would have to be raised with Fred Sayre.⁸²

3 Subsequently, Ms. Johnson did meet Ms. Lucas on an airplane. She asked to speak with Ms.
4 Lucas when she was in Juneau and did so. At that meeting, she requested that Ms. Lucas investigate
5 what occurred as she wanted to return to her job. Ms. Lucas said she would speak with Mr. San Miguel.
6 Ms. Johnson heard nothing further thereafter from Ms. Lucas or anyone else at Fred Meyer.

7 D. Jaime San Miguel – Relevant History

8 Mr. San Miguel began working in Alaska in August 1991 at the College Road McDonalds. In
9 September, 1991 he took a part-time job at the Airport Way Fred Meyer as a shoe sales associate.⁸³
10 That job became full-time in December 1991.⁸⁴ In the summer of 2003, he was transferred to the
11 College Road Fred Meyer where he became section head of the men's apparel department.⁸⁵ He became
12 the apparel PIC (Person In Charge – also known as 4th Assistant] in the Fall of 2004.⁸⁶ In February 1995
13 he entered apparel management training.⁸⁷ He was promoted to Relief Assistant Manager at the
14 Soldotna store and held that position until January 1996⁸⁸ when he was then transferred to Juneau where
15 he was promoted to be the Assistant Manager in March 1996.⁸⁹ He was subsequently promoted to
16 Manager in 2001 when Matthew Laney left.

17 Mr. San Miguel went through a turbulent and emotionally exhausting divorce in the Spring and
18 Summer of 2001. His attendance was erratic. He would come late and leave early. He would break
19 down crying at times. He couldn't do his job. Notwithstanding this, his job was completed and no word
20 ever reached management that he was incapacitated. This was because Mrs. Johnson did his work for
21 him. She "covered" for his absences, worked extra to insure that his inability to work would not result
22 in any adverse job action towards him. She was a true friend and loyal co-employee.

23 There were no disciplinary consequences to his erratic performance and attendance during that
24 time period. Ms. Johnson and his other co-workers successfully protected him until her was
25 emotionally able to do his job again. His erratic performance, attendance and emotional outbreaks were
26

27 ⁸² Exh. 21 - [300517]

28 ⁸³ Exh. 4 - [JSM Tr. 33/19-25]

⁸⁴ Exh. 4 - [JSM Tr. 36/2-7]

⁸⁵ Exh. 4 - [JSM Tr. 37/20-22]

⁸⁶ Exh. 4 - [JSM Tr. 38/14-18]

⁸⁷ Exh. 4 - [JSM Tr. 71/19-23]

⁸⁸ Exh. 4 - [JSM Tr. 73/18-74/14]

⁸⁹ Exh. 4 - [JSM Tr. 74/17-22]

1 tolerated by Fred Meyer and Ms. Johnson stepped in to “hold the fort” and keep things going while he
2 was unable to do so.

3 Mr. San Miguel always made it clear that preferred younger women, both as employees and as
4 potential dating partners. In a sworn Affidavit presented to the EEOC, Matthew Laney, his previous
5 supervisor, stated in this regard:

- 6 • Two older female employees related to him that San Miguel told them “*if I could, I’d*
7 *get rid of you and just hire cute ones.*”
- 8 • San Miguel remarked on a number of occasions that he was interested in dating
9 Kaylana Haase, a female co-worker. Good-looking young women captured his
10 attention.⁹⁰

11 Another female employee, Maranda Willburn, in her sworn Affidavit also commented that San
12 Miguel showed favoritism to young, attractive female employees.⁹¹ Other employees commented about
13 San Miguel’s “laziness” and “poor work habits.” When seeing a pretty, young female customer, he
14 would make comments such as “*I’d give her a job anytime.*”⁹²

15 Once divorced, San Miguel became even more explicit in discussing his sexual interests with
16 subordinates, asking female employees to set him up with someone who was “*hot*”. His discussions
17 centered on sports and “*girls*”. Because he was a bowling buddy of the Store Manager, Fred Sayre, he
18 was seen to be part of a “good old boys network” that his largely female staff had no way of accessing.

19 When Ms. Johnson left to the Philippines in early February with her daughter on emergency
20 leave, San Miguel, in describing the replacement he wanted, said “*Don’t send me an old hag, send me*
21 *someone young and beautiful.*”⁹³

22 E. Havard Replaces Johnson Only To Experience A Similar Campaign

23 In six days, Mr. San Miguel had accomplished his goal of replacing Johnson with Johnna
24 Havard. Ms. Havard was young, pretty and single and had no children. Unsurprisingly, Mr. San
25 Miguel kept Ms. Havard on the day shift (the same one he worked) and subsequently asked her out.
26 His attitude towards her abruptly changed when he learned that she had become engaged to Jeff Smith.

27 Interestingly, Ms. Havard, who worked days during the week of March 11 to March 18, 2002,
28 saw no problems with the recoveries done by Ms. Johnson. After confirming that Mr. San Miguel had
complained to her about the quality of Ms. Johnson’s recoveries, Ms. Havard testified that “it wasn’t

⁹⁰ Exh. 34 – [Affidavit of Matthew Laney]

⁹¹ Exh. 35 – [Affidavit of Maranda Wilburn]

⁹² Exh. 5 – [Affidavit of Sallie Tenwolde]

⁹³ Exh. 6 - [Sarah Dexter Affidavit at p. 2]

major stuff ... it was minor ... it wasn't really an issue"⁹⁴ and stated that there was no difference in the recoveries done by Ms. Johnson than those done while Ms. Johnson was on vacation.⁹⁵

Ms. Havard stayed in Juneau for another week or two after Ms. Johnson's termination before returning north to move her belongings to Juneau. During that time, there was no difference in the recoveries after Ms. Johnson left than when Ms. Johnson was doing them.⁹⁶ She learned of the opening of the Lead Assistant position by way of a call from Mr. San Miguel.⁹⁷ He asked her if she wanted to come down to (the Juneau) store and work as a (Lead) assistant.⁹⁸ There was no formal interview. She was basically "handed the job."⁹⁹

After announcing her engagement to Jeff Smith in the summer of 2002, there was a change in the way Mr. San Miguel treated her.¹⁰⁰ Suddenly, "anything she did wasn't done right or wasn't done good enough or up to (San Miguel's) expectations."¹⁰¹ Mr. San Miguel's criticisms were both oral and in emails.¹⁰² There was no difference in the quality of her work which would cause Mr. San Miguel to become more critical of her.¹⁰³ She felt that she was treated differently because she had become engaged.¹⁰⁴

Where before Mr. San Miguel had communicated primarily with her orally in meetings, after her engagement "she constantly got Office Visions saying that things were don't right."¹⁰⁵ Her motivation and job performance had not changed and she continued to do the best job she could do.¹⁰⁶

Because of the way Mr. San Miguel started treating her, she'd go home crying because she felt she wasn't good enough for the job. Her complaints to Dennis Affleck or Fred Sayre were "swept under the rug."¹⁰⁷ She ended up transferring out of apparel to Fred Meyer Jewelers because of Jaime San Miguel and his treatment of her.¹⁰⁸ She called crying to Dennis Affleck because Mr. San Miguel either

⁹⁴ Exh. 36 - Johanna Havard Depo Transcript [JH Tr] 15/14-21

⁹⁵ Exh. 36 - [JH Tr 15/22-25]

⁹⁶ Exh. 36 - [JH Tr 19/8-12]

⁹⁷ Exh. 36 - [JH Tr 19/13-18]

⁹⁸ Exh. 36 - [JH Tr 19/19-25]

⁹⁹ Exh. 36 - [JH Tr 20/14-21]

¹⁰⁰ Exh. 36 - [JH Tr 26/18-22]

¹⁰¹ Exh. 36 - [JH Tr 26/23 to 27/1]

¹⁰² Exh. 36 - [JH Tr 27/5-8]

¹⁰³ Exh. 36 - [JH Tr 27/15-20]

¹⁰⁴ Exh. 36 - [JH Tr 28/9 to 29/2]

¹⁰⁵ Exh. 36 - [JH Tr 29/10-17]

¹⁰⁶ Exh. 36 - [JH Tr 29/18-22]

¹⁰⁷ Exh. 36 - [JH Tr 29/23 to 30/12]

¹⁰⁸ Exh. 36 - [JH Tr 31/4-8]

1 didn't appreciate her work, would take credit personally for the work she did when corporate people
2 were visiting or blamed others."¹⁰⁹ She transferred even though it meant a \$5/hour pay cut and an
3 inability to pay her bills.¹¹⁰

4 Before she became engaged to Jeff Smith, Mr. San Miguel asked her to come over to his home
5 to do some Latin dancing. She rejected the invitation feeling it inappropriate and not professional.¹¹¹

6 Mr. San Miguel spent so much time "flirting" and acting in an "inappropriate manner" with
7 Felicia Kohnen, another store employee.¹¹² He would "eye" attractive women who walked by him in the
8 store.¹¹³ Hispanic workers were treated more favorably than Asians by Mr. San Miguel.¹¹⁴

9 On at least two separate occasions Mr. San Miguel asked Ms. Havard to "fix him up with dates
10 or with hot women." This was while he was dating Kaylonna Haase, another store employee.¹¹⁵ After
11 Ms. Havard became engaged, she was given less favorable shifts (closing & graves) than she had before
12 her engagement (days).¹¹⁶

13 After her engagement, Mr. San Miguel would give her long tours which could not possibly be
14 completed during a shift. Where he would accept the fact that sometimes because of staffing shortages,
15 work simply couldn't be completed within a shift, after her engagement, this was no longer
16 acceptable.¹¹⁷

17 By late 2002, Ms. Havard was sure that San Miguel was trying to push her out of the job.¹¹⁸ No
18 matter what she did, it wasn't going to be good enough to satisfy Mr. San Miguel.¹¹⁹ By December
19 2002, Ms. Havard, a previously healthy 23 year old woman, was rushed to the hospital with stress-
20 related chest pains.¹²⁰

21 Unlike Ms. Johnson who culturally simply worked harder when criticized by Mr. San Miguel,
22 Ms. Havard, a native-born American, was more vocal in terms of her concerns regarding her treatment.
23 In an email to Mary Lucas and Jim Hill, dated October 6, 2002, she complains of being "treated
24

¹⁰⁹ Exh. 36 - [JH Tr 32/22 to 33/6]

¹¹⁰ Exh. 36 - [JH Tr 34/15-22]

¹¹¹ Exh. 36 - [JH Tr 44/22 to 45/21]

¹¹² [Exh. 36 - JH Tr 45/22 to 46/24]

¹¹³ Exh. 36 - [JH Tr 47/2 to 47/7]

¹¹⁴ Exh. 36 - [JH Tr 47/8 to 48/1]

¹¹⁵ Exh. 36 - [JH Tr 49/2-22]

¹¹⁶ Exh. 36 - [JH Tr 52/21 to 53/1]

¹¹⁷ Exh. 36 - [JH Tr 54/16 to 55/20]

¹¹⁸ Exh. 36 - [JH Tr 56/3 to 57/3]

¹¹⁹ Exh. 36 - [JH Tr 57/4-13]

¹²⁰ Exh. 36 - [JH Tr 63/16 to 64/3]

1 unfairly". She describes being put on opening shift (6 am to 4 pm) then having to work graveyard that
2 same day starting at 11:00 p.m. and being "set up to fail."¹²¹ In the response, she was told she had to
3 speak about this with Fred Sayre.¹²²

4 She responded to that email on October 10, 2002 stating that she had already gone to the store
5 director twice and nothing had changed.¹²³

6 On December 12, 2002 she recorded another of times throughout the Fall that Mr. San Miguel
7 simply didn't show up or showed up late for work.¹²⁴

8 Subsequently, she complained of Mr. San Miguel's repeated unexplained absences and failure
9 to come in when scheduled. On December 29, 2002 she wrote an email subsequently forwarded to Mary
10 Lucas on January 11, 2003 that Mr. San Miguel was a "no show/no call".¹²⁵

11 On January 11, 2003 she made a note and then forwarded it to Mary Lucas confirming a "no
12 show" by an employee, Tonia Avila. Despite having told Mr. San Miguel about his, nothing happened
13 to Avila.¹²⁶

14 On January 15, 2003, she sent an Office Vision to Mary Lucas succinctly summarizing her
15 experiences with Mr. San Miguel:

16 "May, I did talk with Dennis when he came and I still feel like my voice is not heard. I don't
17 want to "burn my bridges" with Dennis but I still feel like there will be no justice brought upon
18 Mr. San Miguel. When I was explaining to Dennis that Jaime no shows and is always late, he
19 said that I was keeping tabs on my Manager. In a way I am but I also feel that he is not leading
20 by example of an apparel manager. His employees see this and this is how they get away with
21 it. For example (and this did happen), our relief assistant (Tonia Avila) called in on Jan 1. Now
22 from working with some other managers in the past, if you call-in on the 1st of January, you are
23 automatically termed. Also from talking with Dennis, I also feel by him not caring about the
24 situations that I have come across, that he doesn't care to lose another dedicated employee. Mr.
25 San Miguel may be a good manager in some other aspects but from what I have observed and
26 the situations I have been in with him, I feel like he knows that he can and will get away with
27 anything his heart desires, even if it's against policy."¹²⁷

28 ¹²¹ Exh. 37 - [202438]

¹²² Exh. 38 - [202435 (Top of the Page)]

¹²³ Exh. 39 - [202437]

¹²⁴ Exh. 40 - [202438F & G]

¹²⁵ Exh. 41 - [202438B]

¹²⁶ Exh. 42 - [202438C]

¹²⁷ Exh. 43 - [202416]

On February 9, 2003, she again noted Mr. San Miguel's "excessive tardiness."¹²⁸ None of Ms. Havard's complaints appear to have ever been acted upon by management at Fred Meyer. Ms. Havard left her job. Mr. San Miguel retained his position as Apparel Manager. His personnel file reflects none of the complaints by Ms. Havard or the investigation into them by Mary Lucas.

Mr. San Miguel's change of heart in regards to Ms. Havard is important because once she became engaged he ultimately utilized many of the same methods and techniques against her that he had successfully used with Johnson.

V.

Applicable Law

FRCP 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Once the moving party shows the absence of an issue of material fact, the non-moving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Id* at 324.

The substantive law governing a claim or defense determines whether a fact is material. T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630 (9th Cir 1987). The court must view the inferences drawn from the facts in the light most favorable to the non-moving party. Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id* at 630-31.

The Ninth Circuit has set a high standard for granting summary judgment in employment discrimination cases. "[W]e require very little evidence to survive summary judgment in a discrimination case, because the ultimate question is one that can only be resolved through a searching inquiry-one that is most appropriately conducted by the factfinder, upon a full record." Schnidrig v. Columbia Machine, Inc., 80 F3d 1406, 1410 (9th Cir) (citations omitted), *cert denied*.

VI.

Argument

¹²⁸ Exh. 44 - [202414 – 202415]

1. A genuine issue of fact exists as to whether the oral representations and personnel manuals of Fred Meyer were included in the employment contract such that Ms. Johnson could only be discharged “for cause”.

Myrna Johnson had every reason to believe, based upon the oral and written representations of Fred Meyer, that her “career” with the company came with certain protections, including that she would only be disciplined, including demotion or termination “for cause”.

Fred Meyer as a sophisticated employer, certainly understands the concept of “for cause” versus “at will” employment. It would of course like to have its cake and eat it to. In the context of salaried employees such as Ms. Johnson this meant, promise a career, expect and exact enormous efforts with the “career carrot” but if inconvenient, or for no good reason at all, demote or terminate that employee without consideration for whether there was “just cause.”

A review of all of the employment documents including initial interview forms, Performance Evaluations, Employee Manual and Corporate Policy Manual confirm that in not one place is employment described as being “at will.” While this is clearly an intentional omission on the part of Fred Meyer, an evaluation of those documents also demonstrates that in not one place is an employee advised that their employment can be terminated for any reason, good, bad or simply at whim. In contrast, the employment materials consistently talk about a “career” with Fred Meyer. “Career” is defined as “doing what one does as a permanent occupation or lifework or for which one trains and which is undertaken as a permanent calling (Webster’s Online Dictionary) It necessarily is “long-term” as opposed to “short-term”.

Companies, such as Fred Meyer, with the need to create a dedicated and skilled work force must offer something to their workers than the promise that they can be terminated at any time for any reason, including a bad one. In fact, it specifically and intentionally avoids advising employees, especially salaried employees, that their employment is “at will”. Instead, they make every effort to sell to employees the prospect of long-term employment through oral representations and writings. They do this in order to obtain the kind of work product and

1 effort exhibited by Ms. Johnson. Ten or twelve hour shifts are common. The job comes first.
2 Salaried employees don't work like that if they think they can be fired at any time on a whim.

3 In this instant matter, from the outset of her first job application, Ms. Johnson stated her
4 desire for long-term employment with the possibility for promotion. That desire is expressed in
5 every annual evaluation when she is asked about her "career" goals. In no instance is she
6 advised that it is unrealistic to spend sixty hour weeks working for the company with the
7 expectation that she will have long-term employment or will only be discharged "for cause". In
8 fact, exactly the opposite is consistently represented to her by the company.

9 The leading case in Alaska on the application of personnel manuals to employment
10 contracts is *Jones v. Central Peninsula General Hosp.*, 779 P.2d 783 (Alaska, 1989). In *Jones*,
11 the Alaska Supreme Court specifically found that personnel manuals could be made part of an
12 employment contract and could create expectations that would change "at will" employment
13 into "for cause" employment.

14 "While an employer need not establish personnel policies or practices, where an
15 employer chooses to establish such policies and practices and makes them known to its
16 employees, the employment relationship is presumably enhanced. The employer secures
17 an orderly, cooperative and loyal work force, and the employee the peace of mind
18 associated with job security and the conviction that he will be treated fairly. No pre-
19 employment negotiations need take place and the parties' minds need not meet on the
20 subject; nor does it matter that the employee knows nothing of the particulars of the
21 employer's policies and practices or that the employer may change them unilaterally. It
22 is enough that the employer chooses, presumably in its own interest, to create an
23 environment in which the employee believes that, whatever the personnel policies and
24 practices, they are established and official at any given time, purport to be fair, and are
25 applied consistently and uniformly to each employee. The employer has then created a
26 situation "instinct with an obligation." *Citing Toussaint v. Blue Cross & Blue Shield of*
27 *Michigan*, 408 Mich. 579, 292 N.W.2d 880 at 885 (1980).

28 The *Jones* Court also found that if an employer wanted to keep employees from relying
upon the personnel manual as modifying their employment contract, the employer would have
to "*clearly and conspicuously tells their employees that the manual is not part of the*
employment contract and that their jobs are terminable at the will of the employer with or
without reason." (779 P.2d at 787)

1 No such disclaimer is found in the Employee Manual. Above the copyright information
2 on a back page in the “Corporate Policy Manual”, with searching, the following disclaimer can
3 be found:

4 “This handbook is not intended to, and indeed does not bestow any additional rights to
5 employment or employment benefits to Fred Meyer Stores employees. In addition,
6 Fred Meyer reserves the right to depart from these guidelines and to take action up to
and including immediate discharge when, in its opinion, such action is necessary to
protect the well-being of the company or its employees.”¹²⁹

7 This disclaimer is neither “conspicuous” nor “clear”. The manual sets out in exacting
8 detail Fred Meyer’s policies and that a deviation from them can result in discipline up to
9 discharge. The disclaimer is easily overlooked because most employees do not look to the
10 copyright page for information about their employment.

11 Second, the disclaimer does not advise how the manual’s exacting description of
12 expected conduct and policies is not part of the employment agreement between the parties.
13 When the manual says you must follow these policies or face discipline, is it reasonable for the
14 employee to expect that adherence to those policies will not subject him or her to discipline?

15 In addition, the disclaimer fails to state in any fashion that employment can be
16 terminable *with or without reason*, the classic description of “at will” employment. Rather, it
17 states that the manual will only be departed from when the action is necessary to “protect the
18 well-being of the company or its employees.” This statement does not accord with “at will”
19 employment and is purposefully vague and ambiguous. An employee, if they found it, could
20 read it and still conclude that their job was protected unless their activities created a risk to the
“well-being” of the company or its employees.

21 Myrna Johnson, Mary Droddy and Rhonda Cox, all state in sworn affidavits that they
22 were never told or explained that their employment was “at will” or described in any fashion
23 which would indicate that they could be terminated for a good reason, no reason or even a bad
24 reason. Instead, they describe the representations made to them, which cause them to work

25
26 ¹²⁹ Exh. 16 - [200566]

1 long and hard hours for their employer, as being one “for cause”. If they perform their jobs and
2 follow company policy and rules, they can expect long-term employment – careers.¹³⁰

3 Minimally, this is a fact question which cannot be resolved by summary judgment. As
4 the *Jones* Court stated:

5 “These courts have stated that whether an employee handbook was incorporated into an
6 agreement between an employer and an employee is a question of fact to be determined
7 in each case. (*citation omitted*) In particular, the facts must show that the employer has
8 somehow indicated to the employee, at least in general, that employment policies
9 favorable to the latter have been established.” (779 P.2d at 785)

10 Given the lack on conspicuity and clarity of the one disclaimer in the multitude of materials
11 provided to employees and in contrast, the repeated references to long-term employment with
12 the company as the product of hard work and adherence to policies and procedures, a genuine
13 issue of fact exists as to whether the combination of writings and oral representations to Ms.
14 Johnson by Fred Meyer created a “for cause” employment contract?

15 2. Whether a system of progressive discipline existed and should have applied to
16 any discipline Fred Meyer instituted as to Ms. Johnson’s performance as a Lead
17 Assistant Manager (First Assistant) in the Apparel Department at the Juneau
18 Fred Meyer Store?

19 A genuine issue of fact exists as whether a system of progressive discipline existed at
20 Fred Meyer and should have applied to any discipline instituted against Ms. Johnson. While a
21 disciplinary process is not described in either the Employee Handbook or Corporate Policy
22 Manual, all three managers deposed in this matter, Fred Sayre, Jaime San Miguel and Myrna
23 Johnson, described the existence of one. It consisted of four distinct stages:

24 Stage One: Counseling: The manager chats with the person.¹³¹

25 Stage Two: Verbal warning: If the same issue is talked about three or four days in a
26 row and it’s not done, then there’s a Verbal Warning.¹³²

27 Stage Three: Written Verbal Warning: “If it continues to be a serious offense ...then
28 we’ll sit down and have it in a written form – it is still verbal – in a

¹³⁰ Exh. 1 – Myrna Johnson Affidavit; Exh. 45 – Mary Drodgy Affidavit; Exh. 46 – Rhonda Cox Affidavit.

¹³¹ Exh. 47 – [Fred Sayre Depo Transcript (FS Tr). 43/19-22]

¹³² Exh. 4 – [SM Tr 140/16 to 141/3]

written form so they will understand that the particular behavior – or that particular project has to be completed in a timely manner.”¹³³

(Also described as) Verbal Written Warning: “It’s a warning that --- ‘Look, this is what could happen if things don’t change around.” (Sayre 43/24 to 44/6) The Written Warning Notice is modified by writing “Verbal” at the top of the page.¹³⁴

Stage Four: Written Employee Warning.¹³⁵ “At the meeting with the employee, we’ll state if it is a verbal warning, or this is an actual write-up, or if it’s a three-day suspension...”¹³⁶

The disciplinary process then can be summarized as informal counseling, followed by a verbal warning if the behavior doesn’t change, followed by a “verbal written” warning with the word “verbal” written at the top of the Written Warning Notice and finally a Written Warning Notice.

While this process can certainly result in some confusion, it is agreed by all three managers that it was in place at Fred Meyer on March 18, 2002. Minimally, a genuine issue of fact exists as to whether such a staged disciplinary process existed and whether Myrna Johnson could expect that process to be utilized in any disciplinary proceedings.

3. Whether Fred Meyer followed its own disciplinary policies and procedures in the week leading up to Ms. Johnson’s termination?

A genuine issue of fact exists as to whether Fred Meyer followed its own disciplinary process in this matter. For example, Myrna Johnson was unaware that she had been subject to any stage of discipline prior to the meeting of March 18, 2002. She did not understand or realize that the Office Visions sent by Mr. San Miguel were actually the first stage or even second stage of the disciplinary process.¹³⁷

¹³³ Exh. 4 – [SM Tr 141/3-10]

¹³⁴ Exh. 47 – [FS Tr 45/1-13]

¹³⁵ Exh. 47 – [FS Tr 44/16-17]

¹³⁶ Exh. 4 – [SM Tr 141/14-24]

¹³⁷ Exh. 1 – Myrna Johnson Affidavit.

1 Fred Meyer teaches its managers that discipline is to be “positive” and multi-staged.
2 For example, “training and counseling” are to be used before “starting a progressive discipline
3 program.”¹³⁸

4 Managers learn from Fred Meyer instructional materials that “discipline on the job is
5 about directing an individual’s behavior to increase performance.”¹³⁹ “The goal of discipline is
6 to change workplace performance in a positive, constructive way or prevent further rule
7 violations.”¹⁴⁰

8 Fred Meyer encourages the use of “positive” discipline as opposed to “negative”
9 discipline. This is because “delivering any message in a negative way, regardless of the reason,
10 will be received with defensiveness and opposition. Negative discipline is one of the biggest
11 de-motivators in the working world.”¹⁴¹

12 Fred Meyer trains its managers to use “Progressive Discipline” to give the employee the
13 opportunity to correct performance problems. “Fred Meyer has a progressive disciplinary
14 policy that should be followed by all management personnel.”¹⁴²

15 Progressive Discipline at Fred Meyer involves two separate components: Informal
16 Progressive Disciplinary Steps and Formal Progressive Disciplinary Steps. Informal Steps are
17 described as:

- Training and counseling
- Consequence line

18 The “Consequence line” is described as “The employee has not chosen to correct the
19 performance issue.”¹⁴³

20 Formal Progressive Discipline is defined as comprising the following actions:

- Talk with the employee
- Document information about your conversation

24 ¹³⁸ Exh. 48 - [202640]

25 ¹³⁹ Exh. 48 - [202641]

26 ¹⁴⁰ Exh. 48 - [202641]

27 ¹⁴¹ Exh. 48 - [202641]

28 ¹⁴² Exh. 48 - [202644]

¹⁴³ Exh. 48 - [202644]

- Complete the Employee Warning Notice (M-1650) and have the employee sign the Employee Responsibility Form (M-1398)
- Tell the employee that his or her job is in jeopardy and that copies of write ups will be put in their employee file
- Talk with your regional human resources supervisor to discuss how you will proceed with these steps¹⁴⁴

Fred Meyer's own materials for management training describe the "Steps for Positive Discipline" as:

- Identify the performance problem
- Get the employee's view of the performance problem
- Ask the employee for a solution to the performance problem
- Agree on a plan to address the performance problem
- Give the employee a verbal or written warning
- Set up a follow-up session.¹⁴⁵

A genuine issue fact exists as to whether the defendants followed their own policy of progressive discipline in this matter. As Myrna Johnson has stated in her sworn affidavit, she was unaware that any of the communications between March 12 and March 16 were intended to be discipline of any form as opposed to be standard communications between managers.¹⁴⁶ In fact, Ms. Johnson had only worked four days when she received the Office Visions which Mr. San Miguel describes as being "verbal warnings". It should be noted that none of those Office Visions utilize any of the language followed by the disciplinary process, whether it is described as "counseling" or "warnings".

She was never asked to give her view of the performance problem or to propose a solution. This was of course because she was doing her job as she has always done in the manner that she was trained. All work is of course subject to reasonable limitations based upon hours available for the tasks, number of tasks, individuals available to work, etc. As demonstrated earlier, the week of March 12, 2002 was very busy. There were critical absences by Ms. Havard and other employees. A major store event occurred on Saturday, March 16

¹⁴⁴ Exh. 48 - [202645]

¹⁴⁵ Exh. 48 - [202650]

¹⁴⁶ Exh. 1 – Myrna Johnson Affidavit.

(50% clearance sale). Ms. Johnson, doing the very best that she could do, worked to midnight or later every day.¹⁴⁷

Notwithstanding this, because Mr. San Miguel's complaints were never identified as being the initiation of a disciplinary process, a genuine issue of fact exists as to what stage of discipline was being imposed on March 18, 2002. For example, both Mr. San Miguel and Mr. Sayre describe the meeting in various ways. Mr. Sayre says it was to "chat with her" because OVs were not getting done.¹⁴⁸

Mr. Sayre describes the Employee Warning Notice¹⁴⁹ as being a "verbal written warning" even though the word "verbal" is not on the page and was not on the page when shown to Myrna Johnson.¹⁵⁰ Mr. San Miguel described the purpose of the meeting was to talk with Ms. Johnson ...and to issue a "verbal warning".¹⁵¹ The document they showed to Ms. Johnson "was not going to be put in her personnel file."¹⁵²

Ms. Johnson did not understand that she was being given a "verbal" written warning. She thought because the document did not have the word "verbal" on it, and threatened her with removal from her position in 30 days if her work did not improve, that she was receiving a "Written Employee Warning Notice."¹⁵³ In fact, since she didn't realize or understand that Mr. San Miguel was treating the Office Visions as Stage One: Counseling discipline and Stage Two: Verbal Warning discipline, she was shocked to find that she was at a Stage Four "Written Employee Warning Notice" on March 18, 2002.¹⁵⁴

Minimally, a genuine issue of fact exists as to whether Fred Meyer followed its own disciplinary process in the week leading up to Ms. Johnson's termination.

4. Whether Ms. Johnson failed to perform her job duties as Lead Assistant Manager in the Apparel Division between March 12 and March 17, 2002:

¹⁴⁷ Exh. 1 – Myrna Johnson Affidavit

¹⁴⁸ Exh. 47 – [FS Tr 40/5-16]

¹⁴⁹ Exh. 49 - [201217]

¹⁵⁰ Exh. 47 – [FS Tr 44/18-22]

¹⁵¹ Exh. 4 – [SM Tr 200/1-19]

¹⁵² Exh. 4 – [SM Tr 201/2-5]

¹⁵³ Exh. 51 - [MJ Tr.151/8-12]; Exh. 1 – Myrna Johnson Affidavit.

¹⁵⁴ Exh. 1 – Myrna Johnson Affidavit

1 Genuine issues of fact exist as to whether Ms. Johnson was in fact satisfactorily
2 performing her job duties in the six days preceding her termination. As the record reflects, she
3 certainly was spending an enormous amount of time at work, clocking in usually before 1:30
4 p.m. for a 2:00 p.m. shift and leaving around midnight or later.

5 We also know that during that week, the store was frequently short-handed. Ms.
6 Havard's absences on two days resulted in Ms. Johnson picking up the manager's work that
7 wasn't done on the day shift. In addition, Ms. Johnson also undertook to complete a planogram
8 that had not been completed in the prior two weeks by Minerva Cortez and Julita Lim and
9 struggled to keep the Apparel Department going during a 50% off clearance sale in which her
10 lead cashier (Ms. Kipple) was sick and Julita Lim left for more than two hours for a prolonged
11 dinner break with Mr. San Miguel and Ms. Havard.

12 Finally, we know from sworn testimony that Ms. Johnson did not let any of the
13 emotional sequellae surrounding taking her daughter to the Philippines interfere with her work.
14 For example, in the Affidavit of Sarah Dexter dated October 24, 2002, she states that Ms.
15 Johnson was able to keep her personal problems "out of the workplace."¹⁵⁵

16 a. Whether she performed recoveries in accordance with Fred Meyer's own
17 standards and training?

18 The ostensible reason for Mr. San Miguel's chief criticisms were the recoveries from
19 March 12 to March 17, 2002. As has been demonstrated, there's no question that Ms. Johnson
20 was capable of performing quality recoveries. She had done so for years as the closing Relief
21 Assistant Manager from 1996 to 2001. Her previous Manager, Matthew Laney, described Ms.
22 Johnson as someone who was an "excellent employee...led by example...was devoted to her
23 job...completed her work in a timely manner...and always outworked her project list."¹⁵⁶

24 Her fellow employees also have testified that her recoveries did not suddenly deteriorate
25 or become sub-par that week. Johnna Havard testified that at the same time Mr. San Miguel
26 was complaining about Myrna Johnson's recoveries, that anything she saw was "minor", "not

27 ¹⁵⁵ Exh. 6 – [Sarah Dexter Affidavit, p. 2].

28 ¹⁵⁶ Exh. 34 – [Matthew Laney Affidavit, p. 2].

1 an issue.”¹⁵⁷ There was no difference between the recoveries after Ms. Johnson returned from
2 vacation as compared with the recoveries while she was on vacation.¹⁵⁸ She observed Ms.
3 Johnson doing her daily assigned tasks because she would see the daily tour highlighted and
4 signed off by Ms. Johnson.¹⁵⁹

5 Paz Carillo has stated under oath that everything “was in order” at the close of business
6 the previous day.¹⁶⁰ Rhonda Cox was asked by Mr. San Miguel to report “secretly” to him
7 about Ms. Johnson’s recoveries. Ms. Cox stated in an EEOC interview that recovery was
8 always a product of how much time was available, that Mr. San Miguel would task Ms.
9 Johnson with projects when she should have only had to work on recovery, and that the
10 recovery in January 2003 (9 months after Ms. Johnson’s termination, was “awful...worse that it
11 has ever been before.”¹⁶¹

12 Similarly, Sarah Dexter stated that she was asked indirectly by Mr. San Miguel through
13 Minerva Cortez to advise him if there were any problems with the recovery Mrs. Johnson
14 supervised on Saturday, March 16, 2002. Her sworn testimony is that she told him that the
15 Apparel department she was responsible for “looked good” when she had arrived for the day
16 shift on March 17, 2002.¹⁶²

17 b. Whether she assembled a planogram correctly in accordance with Fred
18 Meyer’s standards and training?

19 A genuine issue of fact exists as to whether Ms. Johnson assembled a planogram
20 correctly. As noted earlier, Ms. Johnson knew how to assemble planograms and had been
21 doing so for years.

22 She was trained by her supervisors, including Mr. San Miguel, to assemble planograms
23 exactly according to instructions. There was to be no deviation. This is because planograms

24 ¹⁵⁷ Exh. 36 - [JH Tr 15/10-21]

25 ¹⁵⁸ Exh. 36 - [JH Tr 15/22-25]

26 ¹⁵⁹ Exh. 36 - [JH Tr 41/1-5]

27 ¹⁶⁰ Exh. 28 - [Paz Carillo Affidavit for ASHRC]

28 ¹⁶¹ Exh. 32 - [Rhonda Cox ASCHR Interv 1/15/03]; Exh. 46 – Rhonda Cox Affidavit.

¹⁶² Exh. 6 - [Sarah Dexter Aff, p. 3]

are designed to insure that the customer has the same visual experience in any Fred Meyer store.

Planograms and the display of merchandise in Fred Meyer stores is not something which is dependent upon an individual manager's subjective opinions. Such reliance would create chaos, with every store being different, and each manager having different ideas as to the best way to display and merchandise apparel. In fact, Fred Meyer has a highly detailed instruction manual in this regard titled the "Visual Merchandising Standards Manual." (VMSM)

The VMSM contains hundreds of pages of detailed instruction as to every section with the Apparel Department. Chapter 7 – Children's: Baby describes how the Baby section is to be visually presented to the customers.¹⁶³

Ms. Johnson was taught to follow the VMSM. In fact, the Job Description for Lead Assistant Manager for the ALE (Apparel Department) requires as a skill set:

- Ensures compliance with planograms
- Ensures implementation of visual merchandising standards

A genuine issue of fact exists as to whether she complied with the planogram. Mr. San Miguel stated he wanted it done "differently" than what was called for in the planogram. She did her best to meet his deviation from standards but since she was only trained in following the VMSM and planogram instructions, she was never able to satisfy him despite repeated efforts.

In this regard, it should be noted that not only was the planogram unable to be completed, though already tasked out, for the two weeks prior to March 12 when Ms. Johnson returned to work, in fact, it was never completed to Mr. San Miguel's satisfaction, ultimately being disassembled and never used.¹⁶⁴

- c. Whether she performed the remainder of her duties in accordance with Fred Meyer's standards and training?

¹⁶³ Exh. 50 - [202351-202368]

¹⁶⁴ Exh. 51 - [Johnna Havard Affidavit to ASCHR, p. 3 at pp.18]; Exh. 52 – [Charina Fontenot Affidavit to ASCHR, p. 2, pp.8-13]

1 A genuine issue of fact exists as to whether Ms. Johnson performed her other duties as
2 the Lead Assistant Manager for the Apparel Department according to Fred Meyer's standards
3 and training.

4 Fred Meyer appears to argue that whether Ms. Johnson was successfully performing her
5 job duties can only be decided by Mr. San Miguel. That it is his "subjective" decision to be
6 made and no one else can challenge that. This argument flies in the face of the extraordinary
7 training, procedures and manuals in place which determine how work is to be performed. It is
8 challenged not only by co-workers who observed her work at that time and will comment that
9 she was motivated, worked hard, did her job and that there was no decrease in quality of work
10 during her shifts. It is also challenged by her long work hours and own record of responding to
11 Mr. San Miguel's Office Visions, making every effort to comply with his escalating demands.

12 Finally, the deviation from the established disciplinary procedures and Ms. Johnson's
13 immediate replacement with Johnna Havard, all raise a genuine issue of fact as to whether she
14 was in fact failing to do her job as trained and capable of doing so, or if instead, it didn't matter
15 what she did, Mr. San Miguel had decided to replace her with Johnna Havard.

- 16 5. If there were any deficiencies in Ms. Johnson's work performance between
17 March 12 and March 17, 2002, whether such deficiencies merited any
18 discipline, much less threat of loss of her position as Lead Assistant on March
19 18, 2002?

20 Genuine issues of fact exist as to whether any deficiencies or problems with Ms.
21 Johnson's work performance merited in six days the threatened loss of her management
22 position. Under either a "for cause" analysis or "at will" – breach of the covenant of good faith
23 and fair dealing, a fact finder could reasonably conclude that the accelerated and confused
24 application of discipline by Mr. San Miguel and Mr. Sayre was "without cause" and in breach
25 of the covenant of good faith and fair dealing.

- 26 6. What progressive discipline if any was given to Ms. Johnson prior to the
27 meeting of March 18, 2002?

28 A genuine issue of fact exists as to what, if any, progressive discipline was given to Ms.
Johnson prior to the meeting of March 18, 2002. As her Affidavit confirms, she was unaware

1 that she had been subject to any discipline prior to the meeting – including “informal” stage
2 discipline. For this reason, when she was presented with a Written “Employee Warning
3 Notice” on March 18, 2002, and was advised that she had received a “Prior Verbal Warning”
4 [checkbox is checked], she was caught completely unawares. Not only was she receiving the
5 final stage of discipline prior to suspension or termination, she had apparently already gone
6 through the earlier stages of discipline without ever being aware that they had occurred.

7 It was only at Mr. San Miguel’s deposition on January 24, 2006 that Ms. Johnson
8 learned that he in fact had started the informal disciplinary process by giving her a “verbal
9 warning” within one (1) day of her return from emergency leave.¹⁶⁵

10 7. What stage of progressive discipline was given to Ms. Johnson at the meeting on
11 March 18, 2002?

12 A genuine issue of fact exists as to what stage of progressive discipline was given to
13 Ms. Johnson at the meeting of March 18, 2002. She was presented with a Written “Employee
14 Warning Notice”.¹⁶⁶ Her training and experience with Fred Meyer caused her to believe that
15 was the final stage of discipline before suspension or termination.¹⁶⁷ In contrast, Fred Sayre
16 described the meeting as one for “counseling” to be followed by a “written verbal warning”.¹⁶⁸
17 He acknowledged that normally the word “Verbal” is hand-written at the top of the Employee
18 Warning Notice.¹⁶⁹ A review of the document prepared for the meeting confirms that it did not
19 have “Verbal” written on it.¹⁷⁰

20 For all of the foregoing reasons, a genuine issue of fact exists as to what stage of
21 progressive discipline was given at the meeting on March 18, 2002.

22 8. Did Fred Meyer fail to follow its own policies, procedures and promises in its
23 discipline of Ms. Johnson during the week of March 12 to March 18, 2002?

24 ¹⁶⁵ Exh. 4 – [JSM Tr 197/7 to 198/1]

25 ¹⁶⁶ Exh. 49 - Employee Warning Notice [201217]

26 ¹⁶⁷ Exh. 1 – Myrna Johnson Affidavit.

27 ¹⁶⁸ Exh. 47 - [FS Tr 45/1-13]

28 ¹⁶⁹ Exh. 47 - [FS Tr 45/1-13]

¹⁷⁰ Exh. 49 - Employee Warning Notice [201217]

1 Genuine issues of fact exist as to whether Fred Meyer followed its own policies,
2 producers and promises in its discipline of Ms. Johnson. There is no evidence that Ms. Johnson
3 was subject to any form of discipline prior to March 18, 2002 unless one assumes that the
4 Office Visions by Mr. San Miguel were suddenly transformed into “discipline”. Ms. Johnson
5 has testified under oath and in her Affidavit that the first time she realized that any disciplinary
6 process was ongoing was at the meeting of March 18th.

7 The descriptions by Mr. Sayre and Mr. San Miguel of their intentions and the purpose
8 of the March 18 meeting are also subject to differing factual findings. Was it for counseling?
9 Was the Employee Warning Notice in fact a “verbal written warning” not be included in Ms.
10 Johnson’s file or an end stage “written warning”? Genuine issues of fact exist as to what was
11 actually occurring at that meeting. Were the Fred Meyer employment policies and procedures
12 followed and did Ms. Johnson understand as defendants’ assert, that this was really something
13 other than end stage discipline – a written warning threatening job action in 30 days?

14 As demonstrated in this brief, employees were advised and promised that their
15 employment was subject to certain protections. They were taught that if they were not
16 performing their duties, that they would be subject to progressive discipline.

17 Fred Meyer’s own documents describe the purposes for “positive” discipline, how it is
18 to be undertaken and the two way communication process that is required to insure that the
19 employee understands the problem, participates in identifying a solution and then understands
20 and is involved in implementing that solution. A genuine issue of fact exists as to whether Mr.
21 San Miguel followed those procedures.

- 22 9. Whether Ms. Johnson acted reasonably under the circumstances in leaving the
23 Store Manager’s office on March 18, 2002 to continue crying downstairs in the
24 Apparel stock room?

25 A genuine issue of fact exists as to whether Ms. Johnson acted reasonably under the
26 circumstances when she left the meeting. Given the long relationship between Fred Meyer and
27 Ms. Johnson, the fact finder could find that Ms. Johnson, confronted with end stage discipline
28 and unable reconcile her years of training and hard work with Mr. San Miguel’s six day
campaign to end her career, was emotionally overwhelmed.

Given Fred Meyer's own statements about the value of employees and Ms. Johnson's unceasing dedication to her employer's interest for the prior decade, the fact finder could conclude that under the circumstances, her departure was reasonable. A mature adult woman would be embarrassed by her uncontrolled sobbing in that small room with those two large men to where she would need to escape to regroup emotionally. Quite simply, genuine issues of fact exist on this issue as well.

10. Whether Ms. Johnson while sobbing uncontrollably, heard Fred Sayre threaten her with termination if "she left the room"?

A genuine issue of fact exists as to whether Ms. Johnson heard Mr. Sayre's alleged threat that if she left the room, it would be considered a "voluntary termination". The defendants' own brief indicates that it is unknown whether she heard and understood what Mr. Sayre said while she sobbed uncontrollably.

Ms. Johnson has stated at deposition and in Affidavit that she did not hear any statement to that effect. A fact finder, in looking at that meeting and Ms. Johnson's very justified emotional reaction to seeing her career coming to an end, could conclude that she never heard Mr. Sayre's threats.

11. Whether Ms. Johnson "walked off" the job on March 18, 2002 when she left the Store Manager's office "sobbing uncontrollably"?

A genuine issue of fact exists as to whether Ms. Johnson "walked off" the job on March 18 when she left Mr. Sayre's office sobbing uncontrollably. First, there is no evidence that she ever even heard Mr. Sayre's threats in this regard.

Second, she has testified under oath that she did not hear any statements by Mr. Sayre to that effect. Even if they occurred, the fact finder could conclude that she may not have heard him because she was crying so hard and so emotionally bereft.

Third, her actions after leaving the room are inconsistent with someone knowingly "walking off" the job. For instance, when Ms. Johnson left the office, if she was in fact "walking off" the job, one would have expected her to leave Fred Meyer. Instead, she went downstairs to the Apparel stock room, used exclusively by Apparel personnel with a small

1 work area. She continued to cry there and eventually was advised by fellow employees to
2 return upstairs to actually get a copy of the document read to her by Mr. San Miguel.

3 Fourth, she did take sick leave that afternoon because she couldn't stop crying. The fact
4 finder could conclude that this was both permitted and reasonable under the circumstances.
5 The record is replete with other managers coming and going. One of the perks of management
6 is that if you work 60 plus hour weeks, you are also not tied to a time clock. The fact finder in
7 this matter could conclude that under the circumstances, it was reasonable for her to go home
8 as she was unable to stop crying at work.

9 Fifth, the following morning, she called to advise Time and Attendance to debit her
10 Sick Leave Account with the hours missing from the prior afternoon. Notwithstanding the fact
11 that Ms. Johnson had no difficulty in working 11 hour shifts on a routine basis for her
12 employee, if she missed some portion of a shift, she had it debited from her Sick Leave. The
13 fact finder could find that this is inconsistent with Fred Meyer's claim that Ms. Johnson
14 knowingly walked off the job on March 18, 2002. Of course, in reality, it was on March 19,
15 2002 when talking with Time and Attendance, that Ms. Johnson first learned that her position
16 had been terminated.

17 12. Whether Jaime San Miguel replaced Ms. Johnson with Johnna Havard because
18 Havard was younger and single?

19 Genuine issues of fact exist as to whether Mr. San Miguel's conduct was designed and
20 intended to accomplish the removal of Myrna Johnson, an over 40 year old married woman, in
21 order to replace her with a younger, pretty and single woman, Johnna Havard.

22 In Alaska, under state and federal law, a three part test is applied in deciding whether
23 there has been discriminatory treatment. First, the employee must "introduce evidence raising
24 an inference of employer discriminatory intent." Second, once a prima facie case of disparate
25 treatment has been set forth, the burden shifts to the employer to "articulate a legitimate, non-
26 discriminatory reason" for the treatment. Third, if a legitimate reason is established, then the
27 burden shifts to the employee to demonstrate that "discriminatory reasons most likely
28 motivated the employer." The employee normally accomplishes this by showing that the
29 employer's explanation is "pretextual." Thomas v. Anchorage Telephone Utility, 741 P.2d 618,

622 (Alaska 1987).

Defendants acknowledge that Ms. Johnson can establish a *prima facie* case for age discrimination. They claim that she was replaced because she walked off the job. Ms. Havard just happened to be the person who applied for the position. The fact that she was younger (23), pretty and single have no bearing because within a year, she had quit her job with Mr. San Miguel.

The fact finder in this matter could easily find that Fred Meyer's assertion that Ms. Johnson "walked off" the job is simply wrong, factually and legally. The fact finder could also conclude that Ms. Havard's statements to other employees prior to Ms. Johnson's return from the Philippines that she would take Ms. Johnson's job if offered, and the immediate replacement by Ms. Johnson with Ms. Harvard, all demonstrate discriminatory intent.

Mr. San Miguel's subsequent mistreatment of Ms. Havard does not in some way insulate the defendants from their wrongful conduct towards Ms. Johnson. In fact, the parallels between Mr. San Miguel's treatment of these two women, one older and one younger, demonstrate not only a course of improper conduct, in violation of the law, but also a method or *modus operandi* which Mr. San Miguel used with anyone he wanted to remove from that position.

The fact finder in this case could easily conclude that Ms. Johnson was forced out of her job because Mr. San Miguel wanted to replace her with Ms. Havard. Ms. Johnson was simply not young and single. While she is attractive, it's as a mature woman of 50 rather than a young woman of 23.

The fact finder could easily conclude that the replacement of a ten year proven employee with a young woman who worked less than a month, was motivated by an unlawful motive, to replace the older worker with a younger one who may be "more available" to Mr. San Miguel. In this regard, there is extensive testimony by Ms. Havard and other employees of Mr. San Miguel's overt and unprofessional comments and actions towards young women.

The Alaska Supreme Court has held that for purposes of getting to hearing or trial, an employee does not need to prove "pretext". Rather, she must simply establish sufficient facts demonstrating that the employer's explanation was "pretextual" and thereafter, a hearing or

1 trial is warranted.

2 The mere “inference” of pretext from the evidence is enough to support a matter going
3 to hearing. *Raad v. Alaska State Commission for Human Right*, 86 P.3d 899, 186 Ed. Law Rep.
4 551, 84 Empl. Prac. Dec. P 41,629, 93 Fair Empl.Prac.Cas. (BNA) 178, (Alaska,2004).
5 Similarly, the existence of factual disputes as to the evidence when there is an argument about
6 whether an employer’s rationale for adverse job activity is pretextual, requires a hearing to
7 resolve those factual issues. *State, Dept. of Fish and Game, Sport Fish Div. v. Meyer*, 906 P.2d
8 1365, 68 Empl. Prac. Dec. P 44,164, (Alaska, 1995)

9 In the Ninth Circuit, pretext can be demonstrated either “(1) indirectly, by showing that
10 the employer's proffered explanation is 'unworthy of credence' because it is internally
11 inconsistent or otherwise not believable, or (2) directly, by showing that unlawful
12 discrimination more likely motivated the employer.” *Lindsey v. SLT Los Angeles, LLC*,
13 447 F.3d 1138 C.A.9 (Cal.) 2006.

14 Because all factual inferences are to be made in favor of the non-moving party, it is
15 improper in the summary judgment context to require more than simply refutation of the
16 employer’s proffered reasons for the negative employment activity. Because there is not a
17 complete record, it is essential to “to set before the fact finder the task of analyzing the entire
18 record in order to evaluate the credibility of the reasons proffered, the possibility of other non-
19 discriminatory reasons, and the ultimate likelihood that the main motive was discriminatory.”
20 *Lindsey, supra* at 1148.

21 Defendants’ reliance on the “same actor” defense is misplaced in this matter because
22 Ms. Johnson’s ten year career was not initiated by Mr. San Miguel. She was hired by Mr.
23 Laney and Mr. Afflect. While Mr. San Miguel did participate in the decision to promote her in
24 2001 from Relief Assistant to Lead Assistant, Fred Meyer’s own internal hiring practices
25 support and require hiring from within and at that time, there was not a qualified candidate who
26 was younger and single.

27 Plaintiff’s argument here is not that Ms. Johnson was terminated simply because she
28 was older. Rather, it is that when given the opportunity to put a younger, pretty and single

1 worker in Ms. Johnson's job position, Mr. San Miguel orchestrated her termination, effectively
2 discriminating against her because of her age.

3 In this regard, Mr. San Miguel also did not explicitly terminate Ms. Johnson. He did
4 not recommend termination of Ms. Johnson. It was not "within the scope of his
5 responsibilities." He didn't have authority to terminate her.¹⁷¹ Rather, he simply set up Ms.
6 Johnson for the emotional meeting on March 18 in which her departure from the room could be
7 considered a "walk-off".

8 Finally, even if a "same-actor" presumption does exist, it is a rebuttable presumption.
9 Ample evidence exists in this record to demonstrate that Ms. Johnson was more than capable of
10 doing her job and did so. Her termination and replacement by Ms. Havard came about not
11 because Ms. Johnson couldn't do her job – rather, it occurred because Mr. San Miguel decided
12 he could replace her with someone he was more attracted. *Alms v. AdvancePCS, Slip Copy*,
13 2006 WL 2032746, D.Ariz., 2006.

14 13. Whether Jaime San Miguel replaced Ms. Johnson with Johnna Havard because
15 Johnson's parental responsibilities were believed to interfere with her ability to
16 perform her job for Fred Meyer?

17 A genuine issue of fact exists as to whether Mr. San Miguel, in his actions from March
18 12, 2002 to March 18, 2002, were actually "pretextual" and targeted at least in part against Ms.
19 Johnson because of her parental status.

20 The record demonstrates that Ms. Johnson was a very hard and capable worker. For
21 years, Mr. San Miguel had relied upon Ms. Johnson to work sixty plus hour weeks. The
22 Affidavits from co-workers confirm that Ms. Johnson was primarily responsible for keeping the
23 floor going. Mr. San Miguel was not noted for being a hard or diligent worker. In fact, when
24 Mr. San Miguel was going through a situation quite similar to Ms. Johnson's, his personal
25 divorce, his work attendance was erratic and inconsistent and he would have emotional
26 outbreaks, including one that led to a hospitalization. Throughout that time period, it was Ms.
27 Johnson whom he relied upon. It was her ability and work ethic which kept the Apparel
28

¹⁷¹ Exh. 4 – [SM Tr 258/4-16]

1 Department going and insured that Mr. San Miguel's work was done when he was unable to do
2 it himself.

3 Less than eight months later, Ms. Johnson went through similar personal problems
4 requiring that she take an emergency leave. When she returned, she told Mr. San Miguel that
5 she might have to leave again later in the year if her daughter remained in the Philippines and
6 was not doing better. While Mr. San Miguel might have been considering or even moving
7 forward with the idea of replacing Ms. Johnson with Ms. Havard and demoting Ms. Johnson to
8 Relief Assistant again, the fact finder could conclude that this advanced notice of future
9 parenting needs requiring more absence from work may have also motivated Mr. San Miguel.

10 The fact finder could conclude that Ms. Johnson was important to Fred Meyer so long
11 as she was absolutely reliable, a part in a machine that never broke and never needed
12 maintenance. Unlike Mr. San Miguel, who appears to have constant allowances made for his
13 behavior and conduct by his male supervisors with whom he plays baseball and watches
14 football, women and most importantly, Ms. Johnson as a parent in this situation, seem to have
15 been held to a different standard.

16 The fact finder could reasonably conclude that Mr. San Miguel's harsh and unrelenting
17 campaign to orchestrate Ms. Johnson's demotion or termination was because she was perceived
18 by him as no longer being reliable or dependable.

19 As noted in the earlier section, Mr. San Miguel did not hire Ms. Johnson. Her
20 promotion to Lead Assistant, which he participated in, was internal and at the time she applied,
21 Mr. San Miguel was unaware someone younger and more beautiful interested in the position.
22 It was only when Mr. San Miguel, in searching for a temporary replacement, said "*if it is a*
23 *woman, send somebody young and beautiful...and not a hag*",¹⁷² and received Ms. Havard, that
24 he saw the opportunity to use Ms. Johnson's job position to attract the lovely Ms. Havard to
25 Juneau on a permanent basis.

26
27
28

¹⁷² Exh. 6 – [Sarah Dexter Aff, 10/24/02 at p. 2]

Mr. San Miguel also did not fire Ms. Johnson. He simply set up the situation which resulted in her termination. The “same actor” presumption is simply not applicable under these circumstances. If it is, it has been amply rebutted by the extensive record in this matter. A genuine issue of fact exists as to whether Ms. Johnson was discriminated against because of her parental status.

VII. Conclusion

Myrna Johnson’s ten year career was not ended because she “walked-off” her job. Rather, in six days, in a carefully orchestrated campaign that Jaime San Miguel also eventually used against Johnna Havard, she was forced out of her job. The facts in this matter could support a finding that Ms. Johnson was a “for cause” employee and the failure of Fred Meyer to follow its own progressive discipline policies was a breach of that employment agreement. Alternatively, if a jury concludes that Ms. Johnson’s employment was “at will”, a determination could easily be made on this record that the defendants breached the covenant of good faith and fair dealing in the events leading up to and including her termination.

The fact finder can also conclude that Ms. Johnson’s age and parental status formed the basis for some of Mr. San Miguel’s hostile acts. Quite simply, the fact finder could conclude that he wanted to replace her with a young and pretty single woman and did so.

Because there are genuine issues of fact and as a matter of law defendants are not entitled to summary judgment, their motion for summary judgment should be denied.

DATED this 5th day of September, 2006 at Juneau, Alaska.

Respectfully submitted,
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s/Mark Choate

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PROOF OF SERVICE

STATE OF ALASKA, FIRST JUDICIAL DISTRICT AT JUNEAU

I am employed in the City and Borough of Juneau, State of Alaska.. I am over the age of 18 and not a party to the within action. My business address is 424 N. Franklin Street, Juneau, AK 99801.

On September 5, 2006, I served the foregoing document described as REPLY TO DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO REOPEN DISCOVERY, on the interested parties in this action by serving the original true copies, addressed as follows:

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☐ By mail, I deposited such envelope(s) in the mail at Juneau, Alaska, with postage thereon fully prepaid.

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53 of 55

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1 ☐ By personal service, I delivered such envelope(s) by hand to the ☐ office(s); ☐ the
2 court box of the addressee(s)..

3 ☐ By facsimile, I transmitted such documents from Juneau, Alaska, to the offices of the
4 addressee(s).

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6 the addressee(s).

7 ☒ By electronic service through the court of record's electronic service system,.

8 ☒ (Federal) I declare that I am employed in the office of a member of the Bar of
9 this Court, at whose direction the service was made.

10 Executed on September 5, 2006 at Juneau, Alaska..

11 /s/ Mark C. Choate
12 CHOATE LAW FIRM, LLC
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